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In The

Supreme Court of the United States

October Term, 1993

DAVID SNOW, LINDA SNOW, JASON SNOW and KEVIN SNOW,

Petitioners,

vs.

HARNISCHFEGER CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Circuit Court of Appeals' refusal to utilize all available means, including certification to the Massachusetts Supreme Judicial Court, to determine the meaning and scope of an unclear state statute (*i.e.*, M.G.L. c. 260, § 2B) which was central to the disposition of the case at bar and on which no state cases on point exist constitutes a violation of David Snow's, *et al.*, due process and equal protection rights, an encroachment on the state's power and obligation, in derogation of the Tenth Amendment to the United States Constitution, to protect the rights of Snow, *et al.* as delineated by the state, and an affront to the interests of comity, federalism and the *Erie* doctrine?

2. Whether in a summary judgment motion the district court's crediting of the respondent's, Harnischfeger Corp., evidence as submitted in deposition, court transcription, and experts' affidavits and the court's concomitant discrediting of the nonmovant petitioners', David Snow, *et al.*, evidence which was directly opposite that of Harnischfeger Corp., together with the court's failure to view the record in the light most favorable to the nonmovant, Snow, *et al.*, was prohibited by the Federal Rules of Civil Procedure, as interpreted in federal case law, and a violation of Snow's, *et al.*, due process and equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The opinion of the court of appeals (App. 2a) is reported at 12 F.3d 1154. The opinion of the district court (App. 18a) is reported at 823 F. Supp. 22 (D. Mass. 1993).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on December 29, 1993 (App. 1a) and denied a petition for rehearing on January 26,

1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 1652 of 28 U.S. C. provides that the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

2. Rule 56(c)(e) of the Federal Rules of Civil Procedure provides that: (c) The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages; (e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated thereon. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts

showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

3. Rule 1:03 of the Massachusetts Supreme Judicial Court Rules provides for certification of questions of local law to the Supreme Judicial Court from the Supreme Court, the federal appeals court, the federal district court, or from a court of another state.

4. Section 2B of Massachusetts General Laws, chapter 260 is the real estate statute of repose which bars actions in tort for damages arising from any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property which arises more than six years after (1) the opening of the improvement to use or (2) substantial completion of the improvement and the taking of possession.

The constitutional provisions involved in the case are the following:

U.S. Const. amend. 5, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. 10, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.

U.S. Const. amend. 14, § 1, which provides in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Preliminary Statement

The petitioners, husband, wife, and children, sued Harnischfeger Corp, manufacturer of commercial cranes, in December 1990 in the Superior Court of Essex County, Massachusetts. They alleged that the husband's first and second finger, thumb, and most of the palm of his right hand were traumatically amputated as the result of a design defect in the crane trolley which rolled over his hand. Harnischfeger removed the case to federal district court under 28 U.S.C. § 1446. In November 1992, the respondent, Harnischfeger, filed a motion for summary judgment contending that the petitioners' claims were barred by M.G.L. 260, § 2B, the Massachusetts real estate statute of repose. Summary judgment was granted, and the petitioners appealed to

the First Circuit Court of Appeals. They filed a motion at the same time requesting the court to certify two questions to the Commonwealth of Massachusetts Supreme Judicial Court regarding the controlling state statute. The appeals court denied the motion and affirmed the judgment of the district court. The petitioners petitioned for rehearing, but were denied on January 26, 1994.

B. Background and Statement of Facts

When David Snow ("Snow") brought suit in the Superior Court of Massachusetts seeking compensation from the manufacturer of the crane trolley which caused his injury, he rightfully expected that the merits of his case would be judged under Massachusetts law. His legitimate expectations were thwarted, however, when the federal district court, to which the respondent had removed the case under diversity, entered its judgment predicated on mere speculation about the meaning and scope of the controlling state statute. Snow never had the benefit of an authoritative state interpretation of the law as it applied to his case. Instead, the district court, with the appeals court affirming, entered summary judgment based on its prediction that the Massachusetts Supreme Judicial Court would consider a large, manually operated, industrial machine an improvement to real property as defined in *Webster's Third New International Dictionary*,[1] thus designating the manufacturer of the machine a member of the class of actors involved in the construction industry who could claim protected status under the Massachusetts real estate statute of repose, M.G.L. c. 260, § 2B.

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1. *Webster's Third New International Dictionary 1138* (1961) (hereinafter "Webster's") defines "improvement" as a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

This case involves the construction of M.G.L. c. 260, § 2B ("2B") and the fact that the Supreme Judicial Court of Massachusetts has never construed that statute as it relates to large, industrial, manually operated machinery. Central to this issue is the refusal of the appeals court to certify two questions regarding the interpretation of 2B to the Massachusetts Supreme Judicial Court and the injustice which flowed from that refusal,[2] highlighting the tension which exists between diversity jurisdiction and the core principles of federalism. An understanding of the wrong done Snow by the court's refusal is aided by an explication of the facts of the case.

Snow's product liability claims arose when three fingers and a portion of his right hand were traumatically amputated on December 29, 1987 by a trolley wheel of an overhead crane manufactured by the respondent, Harnischfeger Corporation ("Harnischfeger"). At the time of the incident, David Snow was working as an electrician at RESCO, a trash to energy plant in Saugus, Massachusetts.

This litigation began in December, 1990 when the petitioners brought suit contending that the respondent was negligent when it manufactured the trolley without wheel guards, without a proper lockout system and without automatic audio or visual movement alarms.

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2. Snow proposed certifying the following questions:

> (1) Whether the defendant, Harnischfeger, the manufacturer of a manually operated overhead crane, is a member of the class M.G.L. c. 260, § 2B was designed to protect? (2) Whether the district court acted appropriately in using *Webster's Third International Dictionary's* definition of 'improvement' in determining whether the plaintiffs' product liability claims were barred by M.G.L. c. 260, § 2B?

On November 13, 1992, Harnischfeger filed its motion for summary judgment contending that the petitioners' claims were barred by the Massachusetts real estate statute of repose, G.L. 260, § 2B since Harnischfeger had designed the crane specifically for RESCO.

The overhead crane which caused David Snow's injuries was manufactured by Harnischfeger in 1973-1975 at its plant in Milwaukee, Wisconsin, shipped to Saugus, Massachusetts and installed at RESCO by Martin DeMatteo Construction Company in 1975. The crane loads refuse into feed hoppers where the refuse is burned to produce energy. Harnischfeger had been manufacturing such cranes since 1906. At the time Harnischfeger manufactured the overhead cranes for RESCO, it had manufactured over twenty-four thousand such cranes. Harnischfeger had no involvement in the design or construction of the RESCO trash incineration facility.

After oral arguments on Harnischfeger's motion for summary judgment, the district court granted summary judgment on April 20, 1993. In so ruling, the court opined that the crane was an improvement to the real property owned by RESCO and that the respondent was engaged in the protected activity of designing, planning, constructing and improving real property.

The petitioners appealed the judgment of the district court arguing that Harnischfeger was a materialman or supplier and not protected by 2B, and also that there were material facts in dispute regarding whether the crane was unique or simply customized from standard, component parts to comply with certain specifications. After hearing, the court of appeals affirmed the district court's judgment on December 29, 1993. Snow next petitioned the appeals court for a rehearing, but his petition was denied on January 26, 1994.

REASONS FOR GRANTING THE WRIT

Snow was done a great injustice by having his case summarily dismissed without the benefit of an authoritative state construction of the statute under which summary judgment was entered. That injustice was compounded when the appeals court refused Snow's request to certify two questions to the state's highest court in order to clarify the pertinent law, relying, instead, on its own interpretation of who should be exempt from tort liability under Massachusetts' real estate statute of repose. The court abused its discretion by changing the scope of tort liability immunity without advancing any public policy argument to substantiate such a radical modification. The district and appeals courts committed error and abused their discretion in part because they were without clear or adequate guidelines to constrain their discretion.

I.

THE APPEALS COURT ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION WHICH FOUND A LARGE, MANUALLY OPERATED CRANE TO BE AN IMPROVEMENT TO REAL PROPERTY, THUS BESTOWING EXEMPTION FROM TORT LIABILITY UPON THE MANUFACTURER OF THE CRANE AND FACILITATING THE ALLOWANCE OF SUMMARY JUDGMENT PURSUANT TO M.G.L. c. 260, § 2B.

A. The Crane as an Improvement

Mass. General Laws, c. 260, § 2B ("2B") states in pertinent part:

> Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an

> improvement to real property...shall be commenced only within 3 years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than 6 years after the earlier of the dates of: (1) *the opening of the improvement to use;* or (2) substantial completion of the improvements and the *taking of possession for occupancy* by the owner. (Emphasis supplied).

There is no reported Massachusetts case directly on point with the instant case. All the Massachusetts cases interpreting 2B relate to static products. Nonetheless, in construing the intent of the Massachusetts Legislature in effecting 2B, the Supreme Judicial Court found that the Legislature "meant to protect providers of 'individual expertise' in the business of designing, planning, constructing, and administering improvements to real estate"; the statute does not apply to those who can avail themselves of the "quality control standards of the factory, but only to the kinds of economic actors who perform acts of 'individual expertise' akin to those commonly thought to be performed by architects and contractors — that is to say, to parties who render particularized services for the design and construction of particular improvements to particular pieces of real property." *Dighton v. Federal Pacific Electric Co.*, 399 Mass. 687, 695-96 (1987) (citation and internal quotation marks omitted).[3]

The Supreme Judicial Court also stated in *Dighton* that the words of the Massachusetts statue of repose are to be construed

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3. *See also, Klein v. Catalano*, 386 Mass. 701, 716 (1982) (observing that architects, contractors and the like can pre-test construction designs only in a limited fashion unlike manufacturers and suppliers who make their goods in the controlled environment of a factory under strict quality control).

according to their "usual and natural meaning."[4] Only by contorting the language of 2B — specifically the text emphasized, *supra,* can one argue that a manually operated machine is an improvement as that term was intended by the Legislature in promulgating 2B. "Opening a crane to use" or "taking possession of a crane for occupancy" are not syntactically natural or usual.

Similarly, the courts below incorrectly inferred from *Milligan v. Tibbetts Engineering Corp.*, 391 Mass. 364, 366 (1984) (citation omitted) the appropriateness of using Webster's definition of "improvement."[5] Both courts indicated in their opinions that the Webster's definition was the established legal standard for construing the meaning of "improvement." (App. 9a-10a, 22a). *Milligan* makes clear, however, that the use of the Webster's definition is not "out of place" only when an individual's status as a protected actor is not in doubt.[6] In *Conley v. Scott Products,* 401 Mass. 645, 647 (1988), the Supreme Judicial Court noted that the Webster's definition was "helpful." Furthermore, *Dighton v. Federal Pacific Electric Co.*, at 697 proscribed the use of the Webster's definition as being too broad for the purpose of defining an actor's status when the actor's status is not clear as that of an architect or a contractor is. No Massachusetts court has declared that this definition is *the* legal standard, only that it is helpful in some limited situations. In the instant case, Harnischfeger's status as a protected actor under 2B is unclear; and it is inappropriate to use the Webster's definition in the circumstances of this case. The courts may not construe a "sometimes may" as an "always shall" with regard to the use of the Webster's definition.

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4. *Id.* at 705.

5. *Supra,* note 1.

6. *Milligan* at 368.

There is no question that Harnischfeger "designed" the cranes it manufactured. In that regard, Harnischfeger is a "designer," but a designer only to the extent that all manufactured goods are designed. Were Webster's definition to be applied to all manufacturers who made goods installed in, or made an integral part of, buildings (which buildings clearly are improvements to real estate) or land, the class of actors who would fall under the protection of 2B would increase dramatically, with a correspondingly dramatic decrease in the number of those suffering tortious injury who could seek relief. Actions in tort for injury due to design defects in such things as an industrial oven used in a paper coating process,[7] a press,[8] a machine used in the manufacture of automatic feeders,[9] and an imprinting machine[10] would all be barred after six years from the date they were installed. In fact, suits in tort were brought against the manufacturer of each of these machines, even though the machine in question was an addition or betterment to real property which enhanced its capital value, involved the expenditure of labor or money, made the property more useful or valuable, and was not an ordinary repair. The list of goods fulfilling the Webster's definition is potentially endless, and one is hard pressed to believe that either the Legislature or the Supreme Judicial Court intended to structure a law which would be, essentially, a products liability statute of repose without making that intention quite specific and quite clear.

B. Summary Judgment

Of the various errors and misapprehensions of the district and

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7. *Murray v. Goodrich Engineering Corp., Inc.*, 30 Mass. App. Ct. 918 (1991).

8. *Jones v.Cincinnati, Inc.*, Mass. App. Ct. 365 (1992).

9. *Barbosa v. Hopper Feeds, Inc.*, 404 Mass. 610 (1989).

10. *Solimene v. B. Gravel & Co.*, 399 Mass. 790 (1987).

appeals court, the most egregious was the courts' disregard of the standard for summary judgment as each put forth that standard in its opinion and as it appears in Rule 56(c)(e) of the Federal Rules of Civil Procedure. In assessing Harnischfeger's motion for summary judgment, the district court stated that all of the evidence put forth by Snow was to be believed and that all justifiable inferences were to be drawn in Snow's favor. (App. 19a) . The appeals court noted that it was constrained to view the record in the light most favorable to Snow, as well as according to him all beneficial inferences discernable from the evidence. (App. 6a). It is a well-recognized principle that if there are doubts as to the propriety of summary judgment, such doubts should be resolved against granting the motion. Nonetheless, the district court gave credence to Harnischfeger's claim that the RESCO crane was unique and designed especially for RESCO (App. 21a), despite the opinions of two of Snow's experts' as put forth in affidavits that the crane was not unique. (App. 40a, 46a). The appeals court, likewise, chose to ignore Snow's experts, declaring that the experts' opinions, stating that the crane was not unique because it was composed of standardized component parts did not create a genuine issue of material fact. (App. 9a). The appeals court failed to explain why or how it determined that there was no factual issue in light of conflicting expert opinion, instead continuing its memorandum with a discussion of Harnischfeger's advertising brochures in support of the uniqueness of Harnischfeger's cranes.

There exist other internal conflicts in the courts' reasoning with regard to the evidence submitted by the parties. One of Harnischfeger's experts listed sixteen components (of the hundreds or thousands which made up the crane system) which were alledgedly designed and fabricated for the RESCO crane and which, the expert contended, made it unique. (App. 38a). At oral argument in district court, however, Harnischfeger's counsel, responding to the judge's questioning, disavowed that all of the sixteen parts were specifically designed for the RESCO crane.

(App. 48a-49a). At the same hearing, Harnischfeger's counsel agreed that a question of fact existed relative to whether the factual elements of the definition of "improvement" were satisfied, but then assured the court that they were because the elements of complexity and nonstandardization of the crane's components were undisputedly established. (App. 54a-55a). This assurance rings hollow, however, in light of the confusion regarding the custom design of the sixteen components. Additionally, case law has established that a manufacturer who responds to specifications provided by a customer does not automatically assume the identity of a designer. *Wayne Township Board of Education v. Strand Century Inc.*, 411 A.2d 1161, 1164 (1980).

Had either lower court followed the mandate of Rule 56 or federal case law, it would have given the benefit of any doubt to Snow, thus precluding summary judgment under 2B. Indeed, earliest precedent makes clear that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." (Black, J. dissenting). *Clay v. Sun Insurance Office,* 363 U.S. 207, 225 n.21 (5th Cir. 1960) quoting *Marbury v. Madison,* 1 Cranch 137, 163.

II.

PURSUANT TO THE *ERIE* DOCTRINE AND 28 U.S.C. § 1652, SNOW WAS ENTITLED TO HAVE HIS CLAIM DECIDED UNDER MASSACHUSETTS STATE LAW.

When suit is brought in state court and removed to federal court under diversity, both *Erie* and 28 U.S.C. § 1652, the Rules of Decision Act, mandate that the federal courts must use the applicable state law in deciding the case.[11] The party without the

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11. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

choice of forum, in the instant case, Snow, is required to rely on the federal judiciary's ability to predict the governing state law when the law is ambiguous or unclear; but when the law involved is substantive, such a prediction violates the policies underlying *Erie* and its progeny. Section 2B is such a substantive law, for it takes rights from one (*i.e.*, the right to sue for tortious injury) while bestowing rights on another (*i.e.*, the right to be immune from liability in tort).

Theoretically, Snow could have expected the same outcome in federal as in state court regardless of the accident of diversity. The Constitution, as interpreted in *Erie*, requires this result. In reality, not just the First Circuit, but all the federal Circuits, have had problems in predicting state law accurately as evidenced by the not insignificant number of federal cases which states have overruled in subsequent decisions.[12] Clearly, the state laws controlling the outcome of these cases were ambiguous, and recourse to the various state supreme courts for a definitive explication of the laws was warranted (in those states which had certification procedures) particularly if the federal court decision was adverse to the unwilling federal court party.

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12. *See, e.g., Felmont Oil Corp. v. PanAmerican Pet. Corp.*, 334 S.W. 2d 449 (Tex. Civ.App., 1960), *error ref'd n. r. e.*, which expressly refuses to follow *Sinclair Oil & Gas Co. v. Masterson,* 271 F.2d 310 (5th Cir. 1959); *see* E. Brown, *Law of Oil & Gas Leases,* 1958: 1966 Cumulative Supplement, p. 293; *Weymouth v. Colorado Interstate Gas Co.,* 367 F.2d 84, 102 n. 57 (5th Cir. 1966); *see Yarrington v. Thornburg,* 205 A.2d 1, 11 A.L.R. 3d 1110 (Del. 1964), *rejecting Truitt v. Gaines,* 199 F. Supp. 143 (D. Del. 1961); *Travelers Ins. Co. v. Auto-Owners (Mut.) Ins. Co.,* 1 Ohio App. 2d 65, 203 N.E.2d 846 (1964), *rejecting American Fid. & Cas. Co. v. Indemnity Ins. Co. of North America,* 308 F.2d 697 (6th Cir. 1962); *Kelly v. State Auto Ins. Ass'n,* 288 F.2d 734 (6th Cir.. 1961);*Travelers Ins. Co. v. Ohio Farmers Indem. Co.,* 262 F.2d 132 (6th Cir. 1958); *Weed v. Bilbrey,* 201 So.2d 771 (Fla.App. 2d Dist. 1967); *rejecting outright Emerson v. Holloway Concrete Prods. Co.,* 282 F.2d 271 (5th Cir. 1960), *cert. denied,* 364 U.S. 941, 81 S. Ct. 459, 5 L. Ed. 2d 372 (1961), and expressly adopting the dissent of Brown, J. in the *Emerson* case, 282 F.2d at 278.

Even though the law in each case was subsequently clarified, the parties who received an erroneous decision in the federal appeals court had no recourse. Despite the fact that the federal appeals court decision in each case had no *stare decisis* effect due to subsequent contrary state decisions, it nonetheless had *res judicata* and collateral estoppel effect as to the particular parties to the litigation. In essence, a final judgment from a federal appeals court in a diversity case is a one way ticket.[13] This is of particular consequence considering the high percentage of diversity cases in federal courts.[14]

The instant case is an example of such a one way ticket. Even if the Supreme Judicial Court of Massachusetts gets the opportunity to speak to the issue of whether large, industrial, manually operated machines are the type of improvement contemplated by 2B, the Snows will be unable to benefit from any decision contrary to that of the federal court.

The *Erie* doctrine, as well as 28 U.S.C. § 1652 declare that [extant] state laws shall be the rules of decision where they apply. The *Pullman* doctrine requires the federal courts to wait and give state courts the opportunity to determine state law when a federal constitutional claim has a basis in unsettled state law;[15] and

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13. *United Services Life Insurance Co. v. Delaney*, 328 F.2d 483, 484 (1964) (no matter how seasoned the judgment of the district court, if the meaning of a statute is unclear and state case law gives little illumination, any judgment of the federal court as to the meaning of the statute will be a forecast rather than a determination).

14. In one 1993 study commissioned by the Federal Judicial Center, 64.6% of the cases with certified questions were based on diversity. Seron, C., *Certifying Questions of State Law: Experience of Federal Judges*, 6 (Federal Judicial Center 1983).

15. *Railroad Commission of Texas v. Pullman*, 312 U.S. 498 (1941).

Lehman Bros. v. Schein, infra, encourages federal courts to certify questions of unclear state law even if a federal constitutional claim is not involved. United States courts are not, however, to limit, modify, or repeal state doctrine of their own volition.[16] Creating a sweeping change in a statute which alters its essential character and modifies its legislative intent as the court did when it opened the protection of 2B to manufacturers of manually operated machines, puts the federal court in the position of making state law, and this is so whether or not the court's prediction of how the state would construe the statute is accurate. For, fundamental to the Erie doctrine is the recognition that the judiciary is a source of law; courts as well as legislatures, make "laws."[17] It would be against every principle of federalism, as well as unconstitutional, if Congress made temporary state laws, even if those laws could be voided by subsequent and contrary state legislative action. Yet, federal creation of state law occurs each time a federal court makes a guess or a supposition about the meaning or scope of an unclear state law, with the result that diversity litigants, such as Snow, have their claims adjudicated not by state law as mandated by 28 U.S.C. § 1652 and *Erie,* but by a law instituted by a federal court acting in a quasi-legislative capacity.

III.

SNOW WAS DEPRIVED OF HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS BECAUSE ITS CLAIMS WERE NOT ADJUDICATED PURSUANT TO A DEFINITIVE INTERPRETATION OF 2B.

Had this case remained in the state superior court and Snow disagreed with that court's final judgment based on its

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16. *Rehm v. Interstate Motor Freight System,* 133 F.2d 154 (6th Cir. 1943).

17. Note, *Unclear State Law in the Federal Courts: Appellate Deference or Review,* 48 Minn. L. Rev. 747 (1964).

interpretation of 2B, he could have appealed the decision and order to the Supreme Judicial Court for an authoritative determination of the meaning of the statute in relation to the unique facts of his case. But because Snow was unwillingly hauled into federal court, he was denied the right that a state court litigant enjoys and was subject to (possibly) a different statutory interpretation of the controlling law — in essence, a new law created by the federal court.

It is appropriate for state courts to function in a law-making capacity. The function of federal courts however, has been habitually regarded as narrower, being confined to the explication of the texts.[18] Nevertheless, federal courts in diversity cases do make laws, but denominate what are often policy decisions as "predictions of state law" rather than "state lawmaking." This was precisely the scenario in the instant case wherein the court radically expanded the class of actors under the protection of 2B.

By virtue of the constitutional limitations on the power of the federal government,[19] the states (theoretically) exercise substantially exclusive authority in adjusting the interests of persons within their boundaries, except for those areas of law which the federal government has superseded or preempted. Thus, in diversity cases such as the one at bar, the incompatibility between diversity jurisdiction and federalism principles could be mitigated by the process of federal certification of state law questions to a state's supreme court.[20]

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18. Hill, *The Law Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024 (1967).

19. United States Constitution amend. X.

20. Sloviter, *A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism*, 78 Virginia L. Rev. 1684 (Nov. 1992).

Certification of questions of unclear state law does not constitute an abrogation of judicial duty under Article III of the Constitution.[21] On the contrary, it is a wise and productive discharge of it. *Louisiana Power and Light Co. v. City of Thibodous*, 360 U.S. 25, 29 (1959). Employing a certification procedure does nothing more than provide the correct determination of state law to enable the federal court to correctly decide a case,[22] thus ensuring that litigants in federal court are judged by the same standards as those in state court. If there are conflicting and unreliable interpretations of a controlling state statute,[23] such as Snow's and Harnischfeger's divergence as to the meaning of 2B, it is essential that the federal court have the benefit of the state supreme court's authoritative answer to the particular question of law. *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 381 (1988); 108 S. Ct. 636, 637.

IV.

CLARIFICATION BY THE MASSACHUSETTS SUPREME JUDICIAL COURT OF THE MEANING OF 2B IN RELATION TO LARGE, INDUSTRIAL, MANUALLY OPERATED MACHINERY WILL ELIMINATE SNOW'S CONSTITUTIONAL CLAIMS.

Snow's constitutional claims of violation of his due process

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21. Article III requires the federal courts to hear and decide diversity cases, no matter how obstruse the matter and even when there is no authoritative state decision on the question at bar. *United States v. Buras*, 475 F.2d 1370, 1371(1972).

22. *Lehman Bros. v. Schein*, 416 U.S. 386, 94 S. Ct. 1741, 1746 (1974).

23. A debate among parties over the meaning of a statute is a strong indication of the ambiguities it contains. *Bellotti v. Baird*, 428 U.S. 132, 148 (1976).

and equal protection rights derive from the court's refusal to certify questions to the Supreme Judicial Court as to the definitive interpretation of 2B relative to the unique facts of Snow's case. Where there were no Massachusetts cases on point to guide the court's decision, and where the court, therefore, was only able to guess at what the Supreme Judicial Court might rule, Snow received a different and inferior form of justice and, very possibly, a different decision than a litigant whose case was tried in the state court. Additionally, Snow's access to the authoritative font for the interpretation of the law under which his case was summarily dismissed was blocked.

If the Constitution, as interpreted in *Erie* and codified in 28 U.S.C. § 1652 genuinely means that diversity cases are to be adjudicated under state law, then the semantic chicanery of calling a "guess" "state law" cannot stand; for if one person's case is tried under the authority of a guess as to the law's meaning, while another's is adjudicated subject to the authoritative law, there exists no equality of protection of the law as to the two cases and no adequate due process.

V.

THE FAILURE OF THE UNITED STATES SUPREME COURT TO PROVIDE ADEQUATE GUIDANCE TO THE DISTRICT AND APPEALS COURTS REGARDING THE CERTIFICATION TO STATE SUPREME COURTS OF QUESTIONS OF UNCLEAR STATE LAW PREJUDICED SNOW'S INTERESTS, AND WITHOUT PROPER GUIDANCE, COURTS WILL CONTINUE TO ERR BY FAILING TO CERTIFY QUESTIONS OF STATE LAW, TO THE PREJUDICE OF FUTURE LITIGANTS.

At present, there are no clear guidelines nor any established formulae by which federal courts decide when they should utilize

certification. Judge Friendly noted during the American Law Institute meeting in 1966, the incongruity of "hav[ing] a carefully limited provision as to abstention and an absolutely open-end permission as to certification."[24] There is likewise little guidance as to the manner in which a federal judge should ascertain the state law when the highest state court has not spoken to the precise question in issue.[25]

The Court last addressed the question of when to certify in 1956 in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). Further requests for guidelines, and even suggested guidelines themselves, have been put forth since that time. *See, e.g., Snyder v. United States*, 112 S. Ct. 450 (1991); *Russell v. Salve Regina College*, 938 F.2d 315 (1st Cir. 1991); *Cumberland and Ohio Co. of Texas, Inc. v. First American National Bank*, 936 F.2d 846 (6th Cir. 1991), *cert denied*, 112 S. Ct. 878 (1992) (proposed appropriate factors underlying choice of certification). In *Salve Regina*, the court opened the question of when to certify questions of state law, but did not answer it.

Given the multiple requests for further guidance, it seems clear that additional direction is required, particularly since the Court has encouraged the use of certification[26] and noted that use of the certification procedure "is more likely to produce the correct determination of state law . . . ." *Lehman*, 391. The reciprocal correlative of that statement must be that not using certification is less likely to produce the correct determination of state law. This

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24. 43 A.L.I. Proceedings, 373 (1966).

25. *Id.*

26. *See, e.g., Lehman Bros. v. Schein*, 416 U.S. 386 (1984); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Virginia v. American Booksellers Assoc.*, 484 U.S. 383 (1988).

has, in fact, been demonstrated to be a correct statement.[27] It seems axiomatic, therefore, that if there is any question, any doubt, any uncertainty about the meaning or scope of a state statute, a federal court should certify the question to the appropriate state supreme court because all litigants have a right to be governed by the best rule of decision.[28] Anything less than that prejudices their interests.

The appeals court's refusal to certify at Snow's request two questions to the Supreme Judicial court denied Snow this right. Instead of getting a determination of the meaning of 2B as it related to the unique facts of his case, Snow received an *Erie* "guess" and, hence, an inferior form of justice.

The appeals court stated in its opinion that "[a]mbiguity in the application of . . . 2B arises when it is unclear whether a party acted as a materialman or supplier rather than an architect, engineer, contractor, surveyor or some other protected actor." (11a). In the instant case, one of the central questions at issue is the action taken by Harnischfeger in the manufacture of the RESCO crane. Harnischfeger's status without the context of an activities analysis does not automatically qualify the corporation as protected. Thus, the court was faced with ambiguity in applying 2B and should have certified the question to the Supreme Judicial Court.

The appeals court, quoting Supreme Judicial Court Rule 1:03 § 1, stated further that certification of determinating issues was appropriate where it appeared to the certifying court that there was no controlling precedent in the decisions of the Supreme Judicial Court (16a). Although, as the appeals court noted, the Supreme Judicial Court has construed the scope of 2B in a number of cases, all the cases the appeals court cited deal with static products. There is no recorded Massachusetts case construing 2B which deals with

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27. *See* note 12, *supra*.

28. Note, *Unclear State Law in the Federal Courts: Appellate Deference or Review*, 48 Minn. L. Rev. 747, 759 (1964).

a large, manually operated machine.[29] Nonetheless, the court extrapolated from the inapposite cases it cited and found Harnischfeger to be a protected actor. The court then summarily dismissed Snow's cause of action, thereby prejudicing his interests.

Despite the benefits of certification in promoting cooperative judicial federalism,[30] in enabling a correct decision, and in decreasing the tension created by the demands of *Erie* in diversity cases, the federal courts have hesitated to utilize the procedure, indicating their fear of overburdening the state courts as the basis for their reluctance. *See, e.g., Dorman v. Scotti,* 862 F.2d 432, 435 (D. Conn. 1988). Yet, the existence of certification procedures in the majority of states would seem to indicate a willingness perhaps, even, as eagerness on the part of the states to bear this burden.[31] Additionally, the number of cases with a legitimate need to certify would likely not be that great.

Another objection has been the increased time involved with

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29. There are, however, unreported cases at the trial court level, but they are not uniform in their holdings, thus indicating further that 2B is an area of unsettled Massachusetts state law, particularly as it relates to industrial/ commercial machinery. *See, e.g., Andella v. Westinghouse Elevator Co.,* Middlesex 89-5431 (1990) (allowed summary judgment, finding that a store escalator was an improvement under 2B) (56a); *Chesterton v. Jordan Marsh Co.,* Norfolk 141724 (1984) (denied summary judgment finding that a store escalator was not an improvement under 2B) (61a).

30. *Lehman Bros. v. Schein* at 419-20.

31. "Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . state courts stand willing to address questions of state law on certification from a federal court." *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 510 (1985) (O'Connor, J., concurring).

certification. While it is true that cases in which questions have been certified do take more time from filing to disposition, only a relatively small proportion of that time is directly attributable to the use of the certification procedure.[32] The delay caused by the certification process must be set off against the time that would be required for the federal court to research and reach its own answer to the certified question. Furthermore, obtaining a state court answer may result in some economies of time in that the delay attending certification is compensated by the subsequent expedition of other cases involving the same or related questions of state law.

If overburdening state courts is not a problem, and time considerations are not relevant, the lack of clear guidelines remains as the primary impediment to the utilization of certification.

The case at bar presents a timely opportunity to provide the necessary guidance.

VI.

SNOW'S CLAIMS INTIMATELY INVOLVE IMPORTANT PUBLIC POLICY CONSIDERATIONS IN WHICH MASSACHUSETTS HAS A KEEN INTEREST.

The Massachusetts Supreme Judicial Court Chief Justice, Paul J. Liacos, at a recent meeting of state and federal judges, told a group of federal judges: "Don't impose national solutions on local problems"[33] (internal quotation marks omitted).

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32. Seron, C., *Certifying Questions of State Law: Experience of Federal Judges*, 16-17 (Federal Judicial Center 1983).

33. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Virginia L. Rev. 1675, 1892 (Nov. 1992).

States have a strong interest in authoritatively declaring their own law in light of important underlying state policies. Brown, *Fifth Circuit Certification — Federalism in Action,* 7 Cumb. L. Rev. 45, 465 (1977). This interest is particularly keen when the law at issue relates to the policy of immunity from liability for certain tortfeasors. *See generally, Lewis v. Lewis,* 370 Mass. 619, 629 (1976). Massachusetts requires a strict and narrow construction of exemption provisions.[34] In the instant case, the First Circuit Court of Appeals, in affirming the district court, substantially enlarged the number of potential protected actors under 2B rather than fitting their decision to the existing framework of Massachusetts law. By including manufacturers within the ambit of those protected from suit under 2B, the court has provided a negative incentive insofar as safety improvements are concerned.

With the Snow case now being the only case interpreting 2B relative to large, industrial, manually operated machinery, there is a danger that this case will mislead lower state courts that may be inclined to accept federal predictions as applicable precedent. Indeed, this has already occurred.[35] The Massachusetts superior

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34. *Lewis, id.* ("If there has been tortious injury, there should be recovery, and only strong arguments of public policy should justify a judicially created immunityfor tortfeasors . . . ."); *Dept. of Environmental Quality Engineering v. Town of Hingham,* 15 Mass. App. Ct. 409, 411 (1983) (statutory language of exemption provisions must be strictly construed); *Commercial Wharf East Condo, Assoc. v. Waterfront Parking Corp.,* 407 Mass. 123, 129 (1990) (the Supreme Judicial Court will not presume that the Legislature intends a radical change in the common law without a clear expression of such intent); *See also Welch v. Engineers, Inc.,* 495 A.2d 160, 166 (N.J. Super. A.D. 1985) (immunity from liability for injury is not favored in law, and statutes granting tort liability immunity should be strictly and narrowly construed); *Byrd v. Blue Ridge Cooperative,* 356 U.S. 525, 535 (1958) (federal courts in diversity cases must respect the definition of rights and obligations created by the state courts).

35. Judge Lauriat, Associate Justice of the Massachusetts Superior Court, recently granted summary judgment in a case in which he relied almost

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court judge who decided the case relied almost exclusively on the appeals court decision from the case at bar. Had there been a Supreme Judicial Court case on point, he almost certainly would have looked to that for instruction. On the other hand, some evidence suggests that federal courts have shown a preference for citing federal decisions on state law instead of state decisions at rates approaching pre-*Erie* levels.[36] This could have untoward effects. Rather than Justice Brandeis' idea of states acting as individual laboratories, there will be a gradual homogenation resulting in a pre-*Erie* federal common law. With the executive and congressional branches of the federal government exercising ever more power and control, the court is the last bulwark against threats to federalism and the founders' vision of a union of sovereign states.

There is evidence that a substantial number of attorneys remove cases to federal court because of the greater possibility of summary judgment.[37] In an empirical study contrasting federal and state court motion practice, in four of five districts examined, federal courts were more likely than state courts to terminate cases by motion rulings.[38]

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exclusively on *Snow v. Harnischfeger,* 12 F.3d 1154 (1993). The case was *Michell v. UIP Engineered Products, Inc. and A.M. Kinney, Inc.*, Suffolk, Civil Action No. 91-6675-E (March 1994) (68a).

36. *See* Richard A. Posner, *The Federal Courts: Crisis and Reform* 145-46 and tbl. 5.2 (1985).

37. Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction,* 41 The American U.L. Rev. 369, 406 (1989).

38. *Id.* at 439.

Attorneys preferred federal court not only for the availability of judgment, but also based on expectations of lesser hostility there toward business litigants (80% to 85% of defendants are business litigants).[39] Such forum shopping is ironic considering that the twin aims of *Erie* were to prevent forum shopping and promote uniformity. Judge Scalia, in his dissent in *Ferens v. John Deere Co.*, 494 U.S. 516, 535-36 (1990) noted that the wholesale castigation of forum shopping is waning. If this is so, then litigants who remove cases to federal court for the purpose of gaining an advantage they would not have in state court are enabled to manipulate the state's law via the federal courts, thus creating bias against the residents in favor of aliens.

Last, the appeals court implied that the Snows should have brought their motion to certify questions to the Supreme Judicial Court sooner than they did, *e.g.*, at the district court level. (15a). Although the Supreme Judicial Court accepts certified questions from a federal district court, some states' certification procedures prohibit it, accepting questions only from the appeals court or the Supreme Court. This appears to be a procedural issue at first glance which should be resolved in the Federal Rules of Civil Procedure. Yet, the states which allow certification have established their procedures to conform to their state constitutions. Here then, can be seen most clearly the clash between federalism principles and diversity jurisdiction, for if the identity of the originating federal court of a question of state law is a procedural matter, the federal procedural rules should govern and bring about uniformity on this issue, otherwise, the various states would be dictating to the federal government in an area that it is supposed to control under *Erie*. Conversely, if the federal government imposes a procedural rule regarding from which courts the states must accept certified questions, it is abusing state sovereignty under the Tenth Amendment. This conundrum can only be resolved by the court.

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39. *Id.* at 424.

Until such time as the court speaks, forum shopping will continue with its sequela of bias, and there will continue to be lack of uniformity amongst the Circuits with regard to the use of certification.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for certiorari be granted, vacating the summary judgment and certifying the question of the meaning of M.G.L. c. 260, § 2B to the Massachusetts Supreme Judicial Court, or in the alternative, to remand the case to the First Circuit Court of Appeals with instructions to certify the question of the meaning of M.G.L. c. 260, § 2B to the Massachusetts Supreme Judicial Court.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED DECEMBER 29, 1993

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1489.

DAVID SNOW, ET AL.,
Plaintiffs, Appellants,

v.

HARNISCHFEGER CORPORATION,
Defendant, Appellee.

JUDGMENT

Entered; December 29, 1993

This cause came on to be heard on appeal from the United States District Court for the District of *Massachusetts*, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

s/ illegible
Clerk.

[cc: Messrs. Costello and Rogers]

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED DECEMBER 29, 1993

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1489

DAVID SNOW, ET AL.,

Plaintiffs, Appellants,

v.

HARNISCHFEGER CORPORATION,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Douglas P. Woodlock, *U.S. District Judge*]

Before

Torruella and Stahl, *Circuit Judges*,
and DiClerico,* *District Judge*.

Walter A. Costello, Jr. with whom *Julie M. Conway* and *Costello, Barrett and Gonthier, P.C.* were on brief for appellants.

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* Of the District of New Hampshire, sitting by designation.

Appendix B

David M. Rogers with whom *Richard P. Campbell* and *Campbell & Associates, P.C.* were on brief for appellee.

December 29, 1993

DiClerico, *District Judge*. Plaintiffs David Snow, Linda Snow, Jason Snow and Kevin Snow brought an action against defendant Harnischfeger Corporation ("Harnischfeger") alleging defective design and negligence after the trolley wheel of an Harnischfeger crane injured David Snow. Harnischfeger moved for summary judgment, claiming the Massachusetts real estate statute of repose barred the action. The district court agreed and granted summary judgment. We affirm.

I

BACKGROUND

In March 1973, Rust Engineering Company ("Rust"), an engineering and construction firm acting as agent for Refuse Energy Systems Company ("RESCO"), engaged Harnischfeger to assist in the design and manufacture of two thirteen-ton overhead cranes for use at RESCO's Saugus, Massachusetts trash-to-energy plant.[1] The cranes are used to move trash into trash feed hoppers where the trash is burned and steam is generated and converted into electricity. Rust incorporated the cranes into the plant's buildings as part of the original construction. Harnischfeger was not

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1. Harnischfeger has designed and manufactured overhead cranes since 1906 and has built more than 24,000 overhead trolley cranes. Harnischfeger customizes each overhead trolley crane it manufactures. Overhead cranes such as those built by Harnischfeger are generally considered heavy-duty machinery for specific production purposes and used by many industries to lift and move heavy objects.

involved in the design or construction of the RESCO facility, nor did Harnischfeger install the cranes.

On December 29, 1987, the trolley wheel of one of the overhead cranes severed David Snow's third, fourth and fifth finger and a portion of his right hand. At the time, Snow was working at the Saugus facility. The Snow family brought an action in Essex Superior Court, Commonwealth of Massachusetts, alleging the crane was unsafe due to Harnischfeger's failure to equip the trolley with wheel guards and rail sweeps, automatic audio or visual movement alarms, a proper lock-out system or kill switch, and Harnischfeger's failure to warn of inherent risks.[2] Harnischfeger removed the action to the district court pursuant to 28 U.S.C. § 1446, and moved for summary judgment under the Massachusetts real estate statute of repose ("statute").

The statute, Mass. Gen. Laws Ann. ch. 260, § 2B (West 1992) ("M.G.L. c. 260, § 2B"), provides:

> Action [sic] of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property . . . shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2)

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2. In their amended complaint, the Snows charge Harnischfeger with defective design, negligence, breach of express warranty and breach of the implied warranty of merchantability.

> substanatial completion of the improvement and the taking of possession for occupancy by the owner.[3]

Id.[4] The district court found Harnischfeger was included in the class of actors protected under the statute and granted the summary judgment motion.[5]

On appeal the Snows argue (1) the district court improperly granted summary judgment where genuine issues of material fact remained; (2) the district court impermissibly extended repose to the manufacturer of a machine thereby changing Massachusetts' product liability law; (3) the district court improperly found Harnischfeger was a protected actor within the meaning of M.G.L. c. 260, § 2B; and (4) questions of local law are central to the disposition of the appeal and should be certified to the Massachusetts Supreme Judicial Court ("SJC").

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3. Massachusetts courts have construed the statute to apply to implied breach of warranty claims where the underlying cause of action is the same as the tort claim. *Klein v. Catalano*, 437 N.E.2d 514, 526 & n.19 (Mass. 1982); *see also Anthony's Pier Four, Inc. v. Crandall Dry Dock Eng'rs, Inc.*, 489 N.E.2d 172, 175 (Mass. 1986).

4. M.G.L. c. 260, § 2B was last revised in 1984. *Id.*

5. The district court barred the Snows' action noting the RESCO plant became operational in 1975 and the Snows did not institute their action until 1990. In 1986, Harnischfeger designed two replacement trolleys. The Snows do not argue that we should measure the application of the statute from the date Harnischfeger designed the replacement trolleys.

Appendix B

II

DISCUSSION

Standard of Review

"We review a grant of summary judgment *de novo,* using the same criteria incumbent upon the district court." *Gaskell v. Harvard Coop. Soc'y,* 3 F.3d 495, 497 (1st Cir. 1993) (citing *Vanhaaren v. State Farm Mut. Auto. Ins. Co.,* 989 F.2d 1, 3 (1st Cir. 1993); *High Voltage Eng'g Corp. v. Federal Ins. Co.,* 981 F.2d 596, 598 (1st Cir. 1992); *Pedraza v. Shell Oil Co.,* 942 F.2d 48, 50 (1st Cir. 1991), *cert. denied,* __ U.S. __, 112 S. Ct. 993 (1992). The role of summary judgment is "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Wynne v. Tufts Univ. Sch. of Medicine,* 976 F.2d 791, 794 (1st Cir. 1992). It is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden is on the moving party to establish the lack of a genuine, material factual issue, *Finn v. Consolidated Rail Corp.,* 782 F.2d 13, 15 (1st Cir. 1986), and the court must view the record in the light most favorable to the nonmovant, according the nonmovant all beneficial inferences discernable from the evidence. *Mesnick v. General Elec. Co.,* 950 F.2d 816, 822 (1st Cir 1991) (quoting *Griggs-Ryan v. Smith,* 904 F.2d 112, 115 (1st Cir. 1990)), *cert. denied,* __ U.S. __, 112 S. Ct. 2965 (1992); *Caputo v. Boston Edison Co.,* 924 F.2d 11, 13 (1st Cir. 1991). Once the defendant has made a properly supported motion for summary judgment, however, the plaintiffs "may not rest upon mere allegation or denials of [their] pleading, but must set forth specific facts

showing there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citing Fed. R. Civ. P. 56(e)).

Issues of Fact

According to the Snows, four genuine issues of material fact remain in dispute, making summary judgment inappropriate. We have reviewed their contentions and find them to be without merit.

The Snows first argue there is a genuine issue of fact as to whether Harnischfeger is in the construction business.[6] The Snows do not dispute Harnischfeger designed and manufactured the crane. Instead, the Snows assert that these activities are not sufficient for a court to find that Harnischfeger is involved in the construction industry and that such involvement is necessary to bring Harnischfeger within M.G.L. c. 260, § 2B. Harnischfeger contends M.G.L. c. 260, § 2B provides protection " 'to architects, *engineers,* contractors *and others* involved in the *design, planning,* construction or general administration of improvements to real property' " and suggests it deserves repose as an " 'engineer' or 'other' involved in the 'design,' 'planning' and 'construction' of

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6. The Snows assert:

> [t]he defendant claimed that because it manufactured an overhead crane that became affixed to real property, it was involved in the construction business. The plaintiffs contend that the defendant's design and manufacture of an overhead crane which is housed in a structure on real property, does not mean the defendant was involved in the type of construction contemplated by M.G.L. c. 260 § 2B.

Brief of the Plaintiffs-Appellants at 5-6.

the overhead crane." Brief of Defendant-Appellee at 10-11 (alteration in original) (quoting *Klein,* 437 N.E.2d at 523).

Whether a defendant's activities fall within the statute is a question of law. *See, e.g., McDonough v. Marr Scaffolding Co.,* 591 N.E.2d 1079, 1081 (Mass. 1992) (court appropriately granted summary judgment after concluding defendant's actions were construction activity contemplated by M.G.L. c. 260, § 2B). Moreover, as Harnischfeger notes, the statute does not limit its protection solely to those involved in the actual construction of improvements to real property. Harnischfeger may be a protected actor even without being involved in the construction business. As the district court aptly stated, the Snows' contention is "merely [an argument] about how to apply law to the established facts." *Snow v. Harnischfeger,* 823 F. Supp. 22, 24 (D. Mass. 1993). To the extent there is a dispute, it is immaterial to the disposition of the action.

The Snows' next argue there is a genuine issue of fact as to whether the overhead crane is a unique product. They argue the crane, like many standard cranes, was merely customized to fit inside a building, shed or structure. Harnischfeger maintains that the product is unique and custom designed for RESCO, In support Harnischfeger offers affidavits showing the following: Harnischfeger designed, manufactured and constructed the cranes' lifting capacity as well as the dimensions,of the major components for specific plant and job functions; Rust supplied specifications that were the basis of the designs including specified overhead and wall clearances; and Harnischfeger custom designed sixteen component parts and manufactured and assembled virtually all the components. The Snows counter that they have presented evidence showing the crane is a standard design and the trolley was previously designed for sale in Florida.

Appendix B

The Snows' evidence, which consists of Harnischfeger's brochures and literature along with expert affidavits and deposition testimony, does not create any genuine issue of fact for trial. The brochures emphasize that customers should avoid "standard" cranes and should have Harnischfeger's experts design a crane that will satisfy their particular needs. At best, the literature suggests Harnischfeger has standardized the materials used to create the crane and standardized certain components to be mixed and matched into a final product. In addition, the opinions of Snows' experts that the crane, as a final product, is a basic design similar to cranes used in other industries do not contradict Harnischfeger's evidence. A crane can be designed for a particular location and specialized function and still retain the essential characteristics common to industrial cranes. Moreover, the ability of the crane to be adopted for use by another industry is immaterial to Harnischfeger's status as a protected actor because the relevant inquiry involves the motivation behind and the activity of producing the product, not the product itself. *See Dighton v. Federal Pac. Elec. Co.*, 506 N.E.2d 509, 516 (Mass. 1987). Furthermore, the deposition testimony of James Fravert, a Harnischfeger employee, does not establish that the design of the RESCO trolley was the same as one previously used by Harnischfeger for sale to Brevard County, Florida. Fravert does not testify that the *design* was duplicated, only that a design *drawing* was duplicated and the duplicated drawing was modified to create the drawing for the RESCO crane.

Lastly, the Snows raise the issue of the status of the crane, arguing first that there is a genuine issue of fact as to whether the crane is an improvement to real property. Once again, however, the Snows do not dispute any relevant facts but rather the application of law to these facts. The parties agree as to the essential characteristics of the crane. There is an established legal standard

defining improvements for purposes of M.G.L. c. 260, § 2B as well as case law establishing when the definition should be applied. *See Milligan v. Tibbetts Eng'g Corp.*, 461 N.E.2d 808, 811 (Mass. 1984) (adopting definition found in Webster's Third International Dictionary); *see also Dighton,* 506 N.E.2d at 516 (explaining when definition is useful). The Snows suggest no disputed facts that would in any way preclude us from applying the legal standard.

The Snows also argue there is a genuine issue of fact as to whether the crane is a permanent fixture. The SJC has rejected adoption of a fixture analysis to determine applicability of the statute of repose, noting the statute "makes no reference to 'fixtures,' nor does it appear that the Legislature intended, by its choice of the common term 'improvement,' to subsume that tangle of highly technical meanings, often distinct in diverse legal contexts, which is the law of fixtures." *Dighton,* 506 F.2d at 515. The fact that a product is affixed, permanently or otherwise, neither makes the product an improvement nor turns the producer into a protected actor. *Id.* Thus, the crane's status as a permanent fixture is immaterial to our inquiry.

Harnischfeger as a Protected Actor

The Snows further challenge the summary judgment order by maintaining the district court acted impermissibly and without precedent in applying the statute to Harnischfeger, who they define as "manufacturers of a machine." The Snows argue Harnischfeger, as a manufacturer, is outside the class of actors M.G.L. c. 260, § 2B is designed to protect. Harnischfeger admits to having manufactured the crane but argues a manufacturer who engages in protected activities is entitled to repose.

The purpose of the statute is "to protect providers of

'individual expertise' " who "render particularized services for the design and construction of particular improvements to particular piece; of real property." *Id.* The statute does not name a class of protected actors, but instead extends protection to "those who commit 'any deficiency or neglect in the design, placing, construction, or general administration of an improvement to real property.' " *Id.* at 514. Certain actors obviously fall within the statute. *See id.* at 516. These actors ilclude architects, engineers and contractors. *Klein,* 437 N.E.2d at 523. The statute shields these actors from any liability after six years as long as they were involved in an enumerated activity with respect to an improvement to real property. Other actors, such as materialmen and "mere" suppliers, are outside the scope of the statute and not entitled to its protection. *Dighton,* 506 N.E.2d at 514 n.10; *McDonough,* 591 N.E.2d at 1082.

Ambiguity in the application of M.G.L. c. 260, § 2B arises when it is unclear whether a party acted as a materialman or supplier rather than an architect, engineer, contractor, surveyor or some other protected actor. *See Dighton,* 506 N.E.2d at 514. A party is not a protected actor when the party does not perform protected acts. *See id.* at 515. Conversely, an actor such as a manufacturer or supplier may be protected if that actor becomes more than a "mere" supplier by engaging in protected activities. *McDonough,* 591 N.E.2d at 1082 (manufacturer who designed bleacher units specifically for the rink in which they were installed by another is more than mere supplier and entitled to benefit of statute). Thus, application of the statute is necessarily dependent on the nature of the party's activities.[7] *See Dighton,* 506 N.E.2d at 516.

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7. The Snows argue that *Dighton* imposes a requirement upon the court to engage in a two-step analysis to determine whether Harnischfeger is protected under M.G.L. c. 260, § 2B. According to the Snows, *Dighton* requires the court to consider

(Cont'd)

Appendix B

In *Dighton,* the defendant did not claim to have provided particularized services with respect to the improvement — the building — but rather claimed the benefit of the statute as a designer, manufacturer and supplier of a component that fell within Webster's definition of improvement.[8] *Id.* at 515, 516. The SJC did not reject the contention that a producer of a component may be entitled to protection. *See id.* at 516; *see also McDonough,* 591 N.E.2d at 1084. Instead, the SJC rejected a formalistic inquiry and established the producer's motivations and activities as the relevant focus of inquiry, not the nature of the product or the ability to define the product as an improvement or a fixture. *Dighton,* 506 N.E.2d at 516.

(Cont'd)
whether the statute names the party as a protected actor, i.e., an architect or engineer. If the answer is yes, the court may determine whether the defendant engaged in protected acts.

Dighton imposes no such test. The *Dighton* court merely noted that the trial judge framed the question in this bipartite form. 506 N.E.2d at 514. The court rejected the bipartite formulation:

> On its face, § 2B defines the protected actor largely by reference to protected acts. The body of § 2B names no class of protected actors. Rather, its terms extend protection to persons allegedly responsible for acts, i.e., those who commit "any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property."

Id. Thus, the court can and must engage in an activities analysis when the defendant's status as a protected actor is unclear. *See id.*

8. This definition has been adopted by the SJC where the defendant's status as a protected actor is not in doubt. *Id.* at 516.

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In considering whether an actor not clearly within the statute is entitled to repose, the court engages in a fact-based activities analysis. *See id.* The court must consider the motivation of the actor in producing the improvement.[9] *Id.* If the actor designed the improvement for public sale or for general use, then the actor is not protected because the actor is engaged in the activity of creating a fungible product. *See id.* If, however, the improvement is produced for a particular project and to the specifications of an architect or an engineer, M.G.L. c. 260, § 2B may protect the actor as someone engaged in the activity of designing a particularized improvement. *Id.*

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9. The SJC provides the following illustration:

> [I]f a piece of metal sculpture were welded to an exposed girder in a building, it certainly could be characterized as a "permanent addition to or betterment of" the property, one "enhanc[ing] it capital value," one "involv[ing] the expenditure of labor or money," one "designed to make the property more . . . valuable," and one clearly distinguish[able] from ordinary repairs." But would that tell us whether, or to what extent, the sculptor had been involved in the protected *activity* of "improvement to real property?" We think not. If he produced the sculpture on commission by the developer to specifications provided in part by the architect and the engineer, we might conclude that he is protected by § 2B; but if he mass-produced the sculpture and sold it for use in a variety of contexts, or for incorporation into any building, we would conclude that he had been involved merely in the activity of producing and selling a fungible commodity, and not in the activity of improving real estate.

Dighton, 506 N.E.2d at 516 (alteration in original).

Appendix B

Like the defendant in *Dighton,* Harnischfeger does not claim to have rendered particularized services with respect to the design or construction of the RESCO facility. Instead, Harnischfeger claims to be brought within the protection of the statute by designing RESCO's cranes. Pursuant to affidavits submitted, when designing the crane that caused Mr. Snow's injuries, Harnischfeger's motivation in producing the crane was to create, at the request of the construction engineer, an essential component of the plant building, made to the construction engineer's specifications, for sale only to RESCO and for incorporation only into the RESCO plant. RESCO intended the cranes to be a permanent and integral part of the overall plant, making the property useful. Harnischfeger was not motivated to create a fungible crane available to a variety of buyers and appropriate for incorporation into a number of facilities. Harnischfeger's actions conform to those outlined by the *Dighton* Court and are protected activities.[10]

As the plaintiffs note, "[w]hen faced with the question of whether or not the defendant is entitled to repose under M.G.L. c. 260 § 2B, the first question to be answered is 'Is the defendant a protected actor under M.G.L. c. 260 § 2B?' " Brief of the Plaintiffs-Appellants at 11. Having answered affirmatively, we now state our agreement with the trial court that the crane is an improvement to real property within the meaning of the statute. *See Snow,* 823 F. Supp. at 24-25. For purposes of M.G.L. c. 260, § 2B, an improvement is

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10. As the Snows' experts note, a subsequent purchaser could remove and modify the RESCO cranes for use in another industry, although this contingency was neither Rust's nor Harnischfeger's intention. Furthermore, we do not look at possible future uses and are therefore unconcerned that the crane could someday be sold to another party, or could be incorporated into another plant.

> a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

Milligan, 461 N.E.2d at 811 (quoting *Raffel v. Perley*, 437 N.E.2d 1082, 1085 (Mass. App. 1982)). RESCO intended the crane to be a betterment of real property enhancing its capital value and making the property more useful and valuable. Therefore, Harnischfeger is entitled to the protection afforded by M.G.L. c. 260, § 2B.

Certification

Following the district court order and subsequent appeal and shortly before oral arguments, the Snows brought a motion asking for the first time that the following two questions be certified to the SJC:

> (1) Whether the defendant, Harnischfeger, the manufacturer of a manually operated overhead crane, is a member of the class M.G.L. c. 260, § 2B was designed to protect?
>
> (2) Whether the district court acted appropriately in using Webster's Third International Dictionary's definition of 'improvement' in determining whether the plaintiffs' product liability claims were barred by M.G.L. c. 260, § 2B?

The Snows had argued to the district court that *Dighton* was

dispositive of the issues in their case but now claim "[t]he foregoing questions of local law are central to the disposition of this appeal.... [T]he local law on this question has not been clearly determined."[11] PlaintiffsAppellants' Memorandum in Support of their Motion to Certify Questions of Local Law to the Supreme Judicial Court of Massachusetts at 2.

Certification of determinative issues is appropriate where "it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Judicial Court." Supreme Judicial Court Rule 1:03, § 1 (1986). The SJC construed the scope of M.G.L. c. 260, § 2B in a number of cases. *See, e.g., McDonough,* 591 N.E.2d at 1084 (repose extends to designer of bleacher units specifically designed for rink); *Parent v. Stone & Webster,* 556 N.E.2d 1009, (Mass. 1990) (repose extends to contruction engineer who installs distribution panel); *Dighton,* 506 N.E.2d at 516 (repose does not extend to manufacturer of mass marketed circuit breaker afftxed to real—property). The Snows themselves list in their motion for certification no less than ten cases where Massachusetts courts have determined whether a defendant is a protected actor under M.G.L. c. 260, § 2B. Massachusetts courts have also extensively addressed when Webster's definition of improvement is to be utilized. *See Dighton,* 506 N.E.2d at 516; *Milligan,* 461 N.E.2d at 811; *Raffel,* 437 N.E.2d at 1085. Thus, we are satisfied that sufficient guidance is available and certification is inappropriate under the circumstances of this case.

Affirmed.

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11. The Snows also acknowledged the dispositive nature of the case law at a hearing before the district court.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED APRIL 23, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.
90-13096-WD

DAVID SNOW, LINDA SNOW, JASON SNOW and KEVIN SNOW,

Plaintiffs,

v.

HARNISCHFEGER CORPORATION,

Defendant.

JUDGMENT

WOODLOCK, District Judge

In accordance with this Court's allowance of the Defendant's Motion for Summary Judgment on April 20, 1993, it is hereby ORDERED

Judgment for the defendant against the plaintiffs.

BY THE COURT,

s/ Barlow I. Beatty
Deputy Clerk

DATED: April 23, 1993

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED APRIL 20, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.
90-13096-WD

DAVID SNOW, LINDA SNOW, JASON SNOW and KEVIN SNOW,

Plaintiffs,

v.

HARNISCHFEGER CORPORATION,

Defendant.

MEMORANDUM AND ORDER

April 20, 1993

This litigation began in December, 1990, when David Snow ("Snow"), Linda Snow, Jason Snow, and Kevin Snow brought suit in Essex Superior Court, from which defendant Harnischfeger removed the case to this court under 28 U.S.C. § 1446. Snow, an electrician, alleges he was injured by a Harnischfeger Corp. crane at a Refuse Energy Systems Company ("RESCO") trash-toenergy plant in Saugus, Massachusetts. Harnischfeger seeks summary judgment against Snow, arguing that a Massachusetts statute of repose, M.G.L. c. 260, § 2B, applies to bar this action against a person who made an improvement to real property. I agree and will consequently grant the defendant's motion.

Appendix D

I

In assessing Harnischfeger's motion for summary judgment, all of "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986). Given that vantage, the facts in the light most favorable to plaintiffs are as follows:

On December 29, 1987, Snow, an employee of RESCO, worked from a crane's support trolley to repair an overhead lighting problem at the company's Saugus plant. After finishing a portion of his work, Snow and a co-worker came down off the trolley and onto an adjoining catwalk (which served as the service platform to the crane).[1] Both men thought they saw smoke coming out of a trash hopper. Better to investigate, "Snow leaned over the [catwalk] railing and placed his hand on the [crane's] rail to steady himself."[2] Meanwhile his co-worker mistakenly gave the "all clear" sign to the crane operator. When the operator moved the crane, its trolley came down the rail over Snow's right hand, severing three fingers and a portion of his palm.

Snow alleges that Harnischfeger's design of the crane and its trolley was negligent: the trolley wheels should have been equipped with wheel guards; the trolley should have been equipped with an audible or visual warning system; the trolley should have been provided with a "proper lockout system" (which would have required both Snow and his co-worker to unlock the trolley before it would run).

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1. Harnischfeger's Response to Snow's Request for Admissions, Response 10.

2. Plaintiff's Pretrial Memorandum at 4.

Appendix D

Harnischfeger argues that even if Snow's allegations of negligence were correct, his claims would be barred by the applicable Massachusetts statute of repose. The RESCO plant and its two overhead cranes were constructed in 1973-75, and the plant opened for business in 1975. The cranes, Harnischfeger alleges, were improvements to real property, bringing their manufacturer within the protection of c. 260, § 2B, which provides:

> Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property . . . shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.

Because the plant and its cranes were opened to use in 1975, and Snow brought his action in 1990, Harnischfeger asserts Snow's cause is barred by Massachusetts law.

In opposition, Snow contends that Harnischfeger is not a company charged with the "design, planning, construction or general administration" of real property improvements; and that the crane RESCO purchased was not an "improvement" to RESCO's real property.[3] By answering the second question first,

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3. Snow also argues that the parties dispute material issues of fact; but these material issues turn out to be merely arguments about how to apply law to the (Cont'd)

one can most efficiently answer the question whether Harnischfeger is within c. 260, § 2B's protected class.

II

Harnischfeger asserts, without contradiction, that between March, 1973 and June, 1974, it worked with an engineering company employed by RESCO to design and assemble the plant's cranes.

The components of the crane which were custom designed were: (a) the grapple buckets, (b) the length and diameter of wire rope, (c) the hoist drum length and diameter, (d) the gear reducers, (e) the motors (electric), (f) the sizes of the control components, (g) the trolley spread, (h) the electrical conductor system, (i) the operator's cab, (j) the bridge girder sections, (k) the bridge drives and speeds, (l) the trolley drives and speeds, (m) the size of electrical conductors, (n) the bridge and trolley wheel size and types, (o) the bridge rails, and (p) the crane electrical control systems and electrical protection panels. [Toth Affidavit at ¶ 5.]

Harnischfeger's Memorandum in Support of Summary Judgment at 4.[4] The cranes load refuse into feed hoppers, and are

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(Cont'd)

established facts (e.g., whether Harnischfeger is in the "construction business" for purposes of c. 260, § 2B when it manufactures cranes to be installed in buildings). *See* Snow's Memorandum in Opposition to Summary Judgment at 7.

4. Snow asserts that the trolley provided by Harnischfeger for the RESCO crane was originally designed for a Florida purchaser, and merely adapted or sent along to RESCO. First, even if part of an improvement is mass-produced, that does not make the entire improvement stand outside the statute of repose. Second, it is not

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integral to the plant's conversion of trash into energy. There exists a mini-jurisprudence of what constitutes an improvement to real propeLty sufficient to bring the improver within a state's statute of repose; and a subset of cases even treats Harnischfeger and its cranes in particular. The Supreme Judicial Court, in construing c. 260, § 2B, has noted its holding, in another context, that "[t]he word 'improvements' is of broad signification," *Milligan v. Tibbetts Engineering Corp.*, 391 Mass. 364, 366 (1984) (citation omitted); and stated that the words of the Massachusetts statute of repose are to be construed according to their "usual and natural meaning." *Klein v. Catalano,* 386 Mass. 701, 705 (1982) (citation omitted). In holding that the construction of a dead-end road was an improvement to real property within c. 260, § 2B, the SJC adduced the definition of "improvement" in Webster's Third New Int'l Dictionary 1138 (1971): "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs. " *Milligan,* 391 Mass. at 368.

Consistent with the SJC's plain meaning approach to c. 260, § 2B, Massachusetts courts have held that designers, constructors, or

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self-evident that even if the trolley constituted the entire item at issue here, that it would advance Snow's cause to assert it was custom-designed for one purchaser, and then sold, at the last minute, to another. The trolley remains an item built from "*individual expertise* not susceptible of the quality control standards of the factory." *Diahton v. Federal Pacific Electric Co.,* 399 Mass. 687, 695 (citation and internal quotation marks omitted), *cert. den.*, 484 U.S. 953 (1987). In any event, that is not this case, because the item at issue here is the entire Harnischfeger crane, including bridge girders (spanning the length of the building), rails, a trolley, a hoisting mechanism atop the trolley, and the operator's cab.

planners a) of bleachers adapted for a skating rink,[5] b) of an electrical distribution panel for an electric plant,[6] c) of aluminum siding[7] and foam insulation[8] for a private home, d) of a prefabricated building for a transportation authority,[9] e) of a mooring system for a shipboard cocktail lounge,[10] f) of a student center and its plate glass door panels,[11] were all actors within the protection of the State's statute of repose.

Two Massachusetts cases, both concerning electric panels, furnish by their contrasts a ready explication of the statute. In *Dighton v. Federal Pacific Electric Co.*, 399 Mass. 687 (1987), the court held that the supplier and manufacturer of a mass produced circuit breaker panel was a seller of goods, not a designer of an item that constituted an improvement to real property within c. 260, § 2B. The Legislature, the court found, "meant to protect providers of 'individual expertise' in the business of designing, planning, constructing, and administering improvements to real estate"; the

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5. *McDonough v. Marr Scaffolding Co.*, 412 Mass. 636 (1992).

6. *Parent v. Stone & Webster Engineering Corp.*, 408 Mass. 108 (1990).

7. *Salinsky v. Perma-Home Corp.*, 15 Mass.App.Ct. 193, app. den., 388 Mass. 1105 (1983).

8. *Conley v. Scott Products. Inc.*, 401 Mass. 645 (1988).

9. *Cournoyer v. Massachusetts Bay Transp. Auth.*, 744 F.2d 208 (1st Cir. 1984).

10. *Anthony ₃ Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc.*, 396 Mass. 818 (1986).

11. *Klein v. Catalano*, 386 Mass. 701 (1982).

statute does not apply to "mere suppliers of standardized products" who can avail themselves of the "quality control standards of the factory," "but only to the kinds of economic actors who perform acts of 'individual expertise' akin to those commonly thought to be performed by architects and contractors — that is to say, to parties who render particularized services for the design and construction of particular improvements to particular pieces of real property." *Id.* at 695-96 (citation and internal quotation marks omitted).

In *Parent v. Stone & Webster Engineering Corp.*, 408 Mass. 108, 111 (1990), the court held that an engineering company which installed an electrical distribution panel at an electric plant as part of its work in the plant's coal conversion had rendered "particularized services" which "clearly involved the expenditure of labor and money, and served to make the facility productive as a power generating plant."

Harnischfeger's particularized service in designing and constructing the crane installed at the RESCO plant makes it an actor within the protection of the Massachusetts statute of repose. Harnischfeger's work is not similar to the materialman's in *Dighton* nor to that of others excluded from the compass of the statute. *See, e.g., Raffel v. Perley,* 14 Mass.App.Ct. 242 (1982) (survey plans marking property off into individual lots do not constitute an improvement within c. 260, § 2B). Rather, Harnischfeger's efforts here more closely approximate those of Stone and Webster in *Parent.*

In opposition to this conclusion, Snow makes six points in chief. First, he cites *McCalla v. Harnischfeger Corp,* 215 N.J. Super. 160, *certif. den.,* 108 N.J. 219 (1987), in which the New Jersey Superior Court's Appellate Division held that a Harnischfeger crane installed in an iron foundry was not an

improvement to real property within that state's statute of repose. The court drew its analysis from various New Jersey tax cases treating the meaning of the term "fixture," and found that, consistent with those definitions, the crane was not a fixture, but merely a piece of "production machinery." *Id.* at 169. Without arguing against the persuasiveness of the New Jersey case, Harnischfeger provides a counter that goes at least to the weight of authority, and cites three cases which hold its cranes *are* "improvements" as defined by various statutes of repose.[12] For its part, the Massachusetts Supreme Judicial Court has specifically rejected the reasoning which provides the basis for the New Jersey court's holding.

> [Plaintiff] invites us to make the scope of § 2B dependent on the common law of "fixtures." But § 2B makes no reference to "fixtures," nor does it appear that the Legislature intended, by its choice of the common term "improvement," to subsume that tangle of highly technical meanings, often distinct in diverse legal contexts, which is the law of fixtures. We align ourselves with "[t]he overwhelming majority of courts [which] have eschewed a rigid fixture analysis...." Heller, The District of Columbia's Architects' and Builders' Statute of Repose: Its Application and Need for Amendment, 34 Cath.U.L. Rev. 919, 932 (1985).

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12. *Miller v. Consolidated Aluminum Corp.*, 729 F.Supp. 1154 (S.D. Ohio 1990); *Hall v. Harnischfeger Corp.*, 785 F.Supp. 675 (N.D. Ohio 1991); *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minnesota 1988). *See also Witham v. Whiting Corp.*, 975 F.2d 1342 (7th Cir. 1992) (applying Illinois limitations statute to manufacturer which installed hoist crane in steel plant).

Dighton, 399 Mass. at 696 (footnote omitted). Second, the Harnischfeger crane, Snow maintains, is removable; therefore, since it is not "permanent," it is without the Massachusetts statute.[13] Of course, that an item can be removed or replaced hardly means it cannot constitute an improvement. Aluminum siding can be removed; insulation can be replaced; a roof can be rebuilt; a chimney can be torn out and refashioned. Snow's argument was expressly rejected by the Supreme Judicial Court in *McDonough,* 412 Mass. at 640 (plaintiff "argued that the bleachers could not be classified as a real property improvement, since they are not 'permanent' structures, but rather may be disassembled and removed from the rink").

Third, Snow claims that since Harnischfeger has manufactured 29,000 cranes, it cannot, as a matter of law, be a designer of the sort protected by c. 260, § 2B. However, Harnischfeger's 28,999 other cranes are not at issue in this case, and evidence on their mode of manufacture, or whether they were designed for particular purchasers would not be material. As to this crane, uncontradicted record evidence establishes it was designed and fitted to meet the specific requirements of the RESCO plant, as noted above. Further, that a company engaged in design designs many buildings, or designs many improvements to real property, does not determine whether the designer is within the protected class. The purpose of the Massachusetts statute is not merely to protect experimental designs; its rationale "is hardly dependent on some minimum level of creativity on the part of the building designer." *Cournoyer v. Massachusetts Bay Transp. Auth.,* 744 F.2d 208, 211 (lst Cir. 1984) (applying statute to extinguish claim against manufacturer of prefabricated building).

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13. "The fact that the trolleys of the overhead cranes were replaced in 1990, negates the defendant's argument that the overhead cranes and trolleys are permanent fixtures." Snow's Memorandum in Opposition to Summary Judgment at 5.

Fourth, Snow argues that a crane such as Harnischfeger's is not the only means of moving trash and thereby enhancing the value of the plant; and fifth, that since Harnischfeger did not itself install the crane at the plant, it is not part of the class of actors protected by the statute of repose. That other design solutions to the problem of moving and sorting trash in the RESCO plant might be better, or more economical, or less labor intensive, or that other machines or crews of workers could effectively do the labor of the Harnischfeger crane is irrelevant. The question is whether the crane was an improvement to real property which enhanced the property's value; not whether other improvements might be made which would yield similar — or even greater — increases in value, but by other means. The material fact that the crane increased the plant's value to some degree is not in dispute here. Harnischfeger need not have itself installed the crane in the RESCO plant to benefit from the statute. Harnischfeger's activity will be protected if it custom-designed an improvement to real property; in other words, if it manufactured its crane to the particular specifications of the RESCO plant, and thereby rendered a "particular improvement[] to [a] particular piece[] of real property." *Id.* at 696. In *Dighton,* 399 Mass. at 697-98, the Supreme Judicial Court provided a brief comment on the class of actors protected by the statute:

> . . . if a piece of metal sculpture were welded to an exposed girder in a building, it certainly could be characterized as "a permanent addition to or betterment of" the property, one "enhanc[ing] its capital value" . . . . But would that tell us whether, or to what extent, the sculptor had been involved in the protected *activity* of "improvement to real property"? We think not. If he produced the sculpture on

> commission by the developer to specifications provided in part by the architect and the engineer, we might conclude that he is protected by § 2B; but if he mass-produced the sculpture and sold it for use in a variety of contexts, or for incorporation into any building, we would conclude that he had been involved merely in the activity of producing and selling a fungible commodity, and not in the activity of improving real estate.

Harnischfeger, as the RESCO plant's crane designer and manufacturer, producing a crane to meet "specifications provided in part by the architect and engineer," fits even more securely within section 2B's protected class than the sculptor in example one, above.[14]

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14. In its Supplemental Memorandum, Harnischfeger refers to a recently decided case in the Western District of Missouri, *Hayslett v. Harnischfeger Corp.*, Case No. 92-0026-CV-W-2 (February 26, 1993, W.D. Mo.), 1993 U.S. Dist. LEXIS 3011. The district court, in applying the Missouri statute of repose (closely similar to Massachusetts' statute), noted that under applicable state law,

> [A] defendant such as Harnischfeger may make "two separate and distinct arguments" that it is covered by the statute. "First, a manufacturer may claim that its activity in fabricating, assembling or manufacturing building materials or a component part incorporated within the real property in the construction of the improvement 'is, [sic] performing or furnishing, ... construction, including ... construction services, of the improvement' " The second, and alternative, argument available to a defendant such as Harnischfeger is that "it performed or furnished design, planning or engineering

(Cont'd)

Appendix D

Finally, Snow asserts that Harnischfeger did not "render[] any particularized services in the design or construction of the RESCO building." Snow's Supplemental Memorandum in Opposition to Summary Judgment at 7. However, the Massachusetts statute of repose treats improvements to real property, not to *buildings* alone. Massachusetts courts have not required that, to benefit from the protections of c. 260, § 2B, an actor must have designed or constructed a building, or even part of a building. *See, e.g, Crandall Dry Dock,* 396 Mass. at 823 n.8 (without deciding whether ship itself was improvement to real property, "the mooring system made possible the placement of the ship immediately adjacent to the restaurant so that it could be used as a cocktail lounge, thereby enhancing the capital value of the restaurant"); *Tibbetts Engineering,* 391 Mass. 364 (design and

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(Cont'd)

> devices by reason of the design and engineering activities involved in developing its product."

Hayslett at 7.

While I find the Missouri district court's reasoning in *Hayslett* unexceptionable, *Hayslett* adds only to the weight of authority already cited above, in footnote 12. Moreover, Massachusetts courts have not now, nor may they ever, adopt Missouri's two prong test for applying its statute of repose. (I note, however, that Snow has sought to apply to Harnischfeger a very narrow version of the first prong of the Missouri test without giving Harnischfeger the benefit of the second prong. That is, Snow argues, in essence, that if Harnischfeger did not custom design and install materials critical to the building housing the RESCO plant, it is not a protected actor for purposes of c. 260, § 2B. If it did not custom design some necessary part of the building — walls, floor, foundation, roof —; or if it did not itself install the product of its manufacture, then, Snow seems to contend, Harnischfeger is a mere materialman or supplier. But, as noted above, that cramped reading of section 2B is not a persuasive interpretation of Massachusetts law. Snow would like to require Harnischfeger to be a general administrator of a real property improvement; but the statute also provides protection for designers and planners of such improvements. Harnischfeger falls in this latter category.)

construction of dead end road). It is not pertinent that the "improvement" at issue is in part a machine; the Supreme Judicial Court has not held that there is a taxonomy to be applied to determine whether a product is an improvement, but rather it has applied a functional analysis, as shown in *Crandall's Dry Dock, Milligan,* and *McDonough.*

In the language Massachusetts courts have used in construing c. 260, § 2B, the Harnischfeger crane is clearly a "permanent addition to or betterment of" the RESCO plant; it "enhances its plant's] capital value"; it "involves the expenditure of labor or money"; it is "designed to make the property more useful or valuable"; and it is an item plainly "distinguished from ordinary repairs." *Milligan,* 391 Mass. at 368, *Raffel,* 14 Mass.App.Ct. at 245; *see also Crandall's Dry Dock,* 396 Mass. at 823 n. 8 . Further, in fashioning the crane for RESCO, Harnischfeger's individual expertise was engaged in the protected *activity* of designing, planning, or constructing an "improvement to real property." *Parent,* 408 Mass. at 111 (engineering company which installed electrical distribution panel within statute's grant of immunity from suit); *McDonough,* 412 Mass. at 644 (supplier which "designed the bleacher [seating] units specifically for the rink" within statute).[15]

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15. Of course, as I have here several times emphasized, "the fact that a producer's *Product* may be usable by persons involved in protected acts tells us nothing about whether the producer's *activity* is protected. . . ." *Dighton,* 399 Mass. at 698 (emphasis added). If an architect had designed the RESCO plant, his design calling for a mass-produced crane to be permanently installed, whereas the architect's activity in designating and ordering the crane would be protected, the manufacturer's in producing it would probably not be protected. In the present case, however, the manufacturer worked closely with plant engineers in designing the crane to meet the plant's particular specifications. Harnischfeger's role as manufacturer is akin to that of Marr Scaffolding in *McDonough* (bleachers), an actor whose activity was within the statute.

Appendix D

III

Snow brought this action more than six years after Harnischfeger's crane was built and opened for use in the RESCO plant. Therefore, his action is extinguished by the Massachusetts statute of repose. Harnischfeger's motion for summary judgment is hereby ALLOWED.

s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

APPENDIX E — AFFIDAVIT OF BRUCE MANNING IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED APRIL 30, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO.: 90-13096-WD

DAVID SNOW, LINDA SNOW, JASON SNOW and KEVIN SNOW,

Plaintiffs

v.

HARNISCHFEGER CORPORATION,

Defendant

AFFIDAVIT OF BRUCE MANNING

I, Bruce Manning, on oath depose and state as follows:

1. I am the plant manager for Refuse Energy Systems Company's (RESCO) plant in Saugus, Massachusetts. The original construction of the plant was completed and its operation began in 1975. As part of that original construction, two overhead cranes were incorporated into the plant's buildings. They were crane serial numbers C24935 and C24936. These cranes have been and are an integral component of the plant buildings. They are used to lift and move trash using large grappling shovels from the receiving area to the refuse feed hoppers. The trash is then fed into a burner and burned. As a result of this combustion, steam is generated and converted through a turbine into electricity. The

cranes operate almost continuously throughout the day loading trash into the feed hoppers. This loading operation constitutes an essential part of the overall purpose and function of this plant which converts refuse into electric power.

2. The cranes are supported on runway girders which span the entire length of the trash pit and feed hopper area of the plant in an East-West direction. The bridge girders of the cranes are supported by these runway girders. The bridges move along the girders in an East-West direction. The trolleys of the cranes are supported by the bridges. The trolleys contain the hoisting mechanisms which lift the grappling shovels. They move in a North-South direction. They were installed as an integral component of the plant building. There were not any significant modifications or changes to the structures of these cranes from 1975 through 1987.

3. Due to the cranes' function of continuously loading trash into the trash feed hoppers, they are an integral and important component of the overall operation of the plant. They constitute a permanent addition to the property as part of the plant buildings. As installed and constructed, they were intended to make the property useful and valuable as an integral part of the overall plant.

Signed under the pains and penalties of perjury this 30th day of April, 1992.

s/ Bruce Manning
Bruce Manning

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS.

Appendix E

Then appeared the above-named Bruce Manning and swore to the truth of the above statements before me.

s/ Martha L. Murray
Notary Public
My Commission Expires: 6/95

APPENDIX F — AFFIDAVIT OF ANDREW R. TOTH IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED NOVEMBER 6, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO.: 90-13096-WD

DAVID SNOW, LINDA SNOW, JASON SNOW and KEVIN SNOW,

Plaintiffs

v.

HARNISCHFEGER CORPORATION,

Defendant

AFFIDAVIT OF ANDREW R. TOTH

I, Andrew R. Toth, on oath depose and state as follows:

1. I am presently the Director of Product Safety for Harnischfeger Industries, Inc. I was employed by Harnischfeger Corporation from 1962-1987, in various capacities including Chief Engineer for Hoist Products from 1973-1982.

2. I have reviewed and am familiar with the business records of Harnischfeger regarding two overhead cranes, serial numbers C24935 and C24936, which were installed in the Refuse Energy Systems Company's (RESCO) plant in Saugus, Massachusetts. These records include the complete sales file and the engineering drawings. I have also inspected these cranes at the RESCO plant.

Appendix F

During the 30-year period of my employment at Harnischfeger Corporation and Harnischfeger Industries, Inc., I have become knowledgeable about the overhead cranes manufactured and designed by Harnischfeger Corporation.

3. Beginning in March, 1973, Harnischfeger had communications with the Rust Engineering Company of Louisiana regarding the design and manufacture of two 13 ton overhead cranes for use at a trash incineration plant which was planned for construction in Saugus, Massachusetts. The plant was to be operated by the Refuse Energy Systems Company. Rust was the engineering and construction firm acting as RESCO's agent in specifying and purchasing the overhead cranes for incorporation into the plant.

4. Overhead cranes such as these were not mass produced by Harnischfeger. Rather, they were custom designed, manufactured and constructed to meet the specifications of the individual customer and the requirements of the particular plant under construction. For example, the lifting capacity and the dimensions of the major components of these cranes (the bridge girders, trolley and hoists) were designed to meet the unique lifting requirements for this particular plant under construction as specified by Rust Engineering. Engineering drawings were created for the cranes only after a specific order was received, and then they were submitted for approval by Rust Engineering before manufacturing was begun. The components of the crane would be designed, manufactured and constructed for incorporation into the specific building and job function intended by the particular customer.

5. During the period between March 1, 1973 when Harnischfeger first had contact with Rust Engineering until June, 1974 when the subject cranes were shipped from Harnischfeger's plant in Milwaukee, Wisconsin, Rust and Harnischfeger had

communications about the specifications and requirements for these cranes. The crane was intended to be incorporated into a trash incineration plant and used to load trash into refuse hoppers. Rust specified to Harnischfeger, among other things, the following features of the cranes: (a) the required amount of refuse to be moved per hour, (b) the span of the bridge girders, (c) the lifting height, (d) the trolley, bridge and hoist cycles and speeds, (e) the type of controls and (f) the type of grapple. The cranes were custom designed, manufactured and built by Harnischfeger in accordance with the specifications provided by Rust for the purpose of handling trash at the RESCO plant. The components of the crane which were custom designed are: (a) grapple buckets, (b) length and diameter of wire rope, (c) hoist drum length and diameter, (d) gear reducers, (e) motors (electric), (f) sizes of control components, (g) trolley spread, (h) electrical conductor system, (i) operator's cab, (j) bridge girder sections, (k) bridge drives and speeds, (l) trolley drives and speeds, (m) size of electrical conductors, (n) bridge and trolley wheel sizes and types, (o) bridge rails, (p) crane electrical control systems and electrical protection panels.

6. By way of illustration, attached as Exhibit A is a copy of the detailed specifications for the cranes which was submitted to Harnischfeger by Rust Engineering. Attached as Exhibit B is a copy of Harnischfeger's Final Proposal and Addenda for the cranes. Attached as Exhibit C is a copy of the certified print of the Clearance Drawing for the cranes. Attached as Exhibit D are copies of the Wiring Diagrams for the cranes. Attached as Exhibit E are copies of the Trolley Layout, Bridge Layout, Front Platform, Access Platforms, Handrails and Ladders, Rear Platform, Access Ladder Guard and Front Platform Drawings for the cranes. Finally, Exhibit F is a videotape of the cranes in operation at the RESCO plant on February 7, 1991 which demonstrates their configuration, dimensions, features and operation.

Appendix F

7. Each crane had lifting capacity of 13 1/2 tons. The maximum lifting height was 102 feet. The bridge girders spanned over 78 feet. The shipment weight for each crane was 170,000 pounds. The cranes were custom made to fit within the building so that the overhead clearance was only 6 inches and the wall clearance was only 1 7/8 inches.

8. The cranes are unique and custom designed, planned, engineered, approved, and constructed. They were intended to be incorporated as a permanent fixture of the RESCO plant. The cranes are not structures which can be disassembled effectively, rebuilt and used in another structure without major modifications. As such, Harnischfeger was involved with Rust in the design, planning and construction of these cranes which were intended to be, and ultimately became, an integral component of the plant.

9. The purchase price for the cranes was $437,000.

Signed under the pains and penalties of perjury this 6th day of November, 1992.

s/ Andrew R. Toth
Andrew R. Toth

Then appeared the above-named Andrew R. Toth and swore to the truth of the above statements before me.

s/ Deloris Endus
Notary Public
My Commission Expires: 6/18/95

APPENDIX G — AFFIDAVIT OF DAVID MACCOLLUM IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED DECEMBER 4, 1992 WITH ATTACHMENT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO.: 90-13096-WD

DAVID SNOW, LINDA SNOW, JASON SNOW and KEVIN SNOW,

Plaintiffs

v.

HARNISCHFEGER CORPORATION,

Defendant

AFFIDAVIT OF PLAINTIFF'S EXPERT,
DAVID MacCOLLUM

I, David MacCollum, on oath depose and state as follows:

1. I have been retained as the plaintiffs' crane expert in the above referenced case.

2. I have investigated hundreds of crane accidents and I have visited over thirty buildings or structures which housed or supported overhead cranes similar to the one at issue in the above referenced case.

Appendix G

3. Overhead cranes, similar to the one at issue in this case are not solely used in the trash incineration business.

4. Overhead cranes are used by industry because they are able to enhance production in the most efficient manner.

5. Overhead cranes like the one at issue in the above referenced case are always housed in buildings or supported by structures to provide the industry with greater control of production and the environment.

6. Overhead cranes are used for specific production purposes and not to enhance the value of real estate.

7. Other means, such as conveyor belts, shovels and manpower while not as efficient or as productive, are available and have been used to accomplish the same tasks that overhead cranes accomplish.

8. In my opinion, Harnischfeger's design and manufacture of the overhead crane and trolley at issue are not unique.

9. Other manufacturers, such as Milwaukee Crane, Shaw Box/Dresser, Shepard-Niles Bridge Crane and Reading Crane produce overhead cranes and trolleys similar to the one at issue.

10. The ANSI B30.2 standards apply to overhead cranes and gantry cranes as well as semi-gantry, cantilever gantry, wall cranes, storage bridge cranes and others having the same fundamental characteristics because they all have trolleys and similar travel characteristics. See attachment.

11. Section 2-0.2 of the ANSI B30.2 Standard defines a crane

as "a machine for lifting and lowering a load and moving it horizontally, with the hoisting mechanism an integral part of the machine. Cranes, whether fixed or mobile, are driven manually or by power." See copy of definition attached.

12. Section 2-0.2 of the ANSI B30.2 Standard defines overhead cranes as "a crane with a movable bridge carrying a movable or fixed hoisting mechanism and traveling on an overhead fixed runway structure." See copy of definition attached.

13. Pursuant to the ANSI B30.2 definitions, overhead cranes and trolleys similar to the one at issue are pieces of machinery.

14. Overhead cranes and trolleys similar to the one at issue are pieces of heavy duty machinery, used solely for production purposes.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 4 DAY OF DECEMBER, 1992.

s/ David MacCollum
David MacCollum

Appendix G

USA STANDARD

SAFETY CODE FOR CRANES, DERRICKS, HOISTS, JACKS AND SLINGS

Overhead and Gantry Cranes

USAS B30.2.0 - 1967

Partial Revision of USAS B30.2-1943

American National Standard

This standard is one of approximately 6000 approved as either a USA Standard or as an American Standard. It became an American National Standard in October 1969 when the Institute changed its name to American National Standards Institute, Inc.

ANSI, 1430 Broadway, New York, N.Y. 10018

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Appendix G

CHAPTER 2-0

SCOPE, DEFINITIONS, REFERENCES

* * *

2-0.2.1.8 *Overhead Crane.* A crane with a movable bridge carrying a movable or fixed hoisting mechanism and traveling on an overhead fixed runway structure.

* * *

APPENDIX H — AFFIDAVIT OF E. PATRICK MCGUIRE IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED DECEMBER 4, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO.: 90-13096-WD

DAVID SNOW, LINDA SNOW, JASON SNOW and KEVIN SNOW,

Plaintiffs

v.

HARNISCHFEGER CORPORATION,

Defendant

AFFIDAVIT OF PLAINTIFF'S EXPERT,
E. PATRICK MCGUIRE

I, E. Patrick McGuire, on oath depose and state as follows:

1. I have been retained as the plaintiffs' human factors expert in the above referenced case.

2. The basis for the expert opinions I rendered in the above referenced case are my training and certification as a Federal OSHA Compliance Instructor; 25 years of education and training in the field of warnings, providing consulting advice to federal agencies, my training and experience in industrial hygiene and ergonomics, the study of human error and the investigation of hundreds of accidents.

Appendix H

3. Overhead cranes and trolleys, like the one at issue in the above referenced case have been used in various industries since 1901.

4. The steel industry, the food industry, the automotive and metal working industry, the foundry industry, power transmission plants and the ship building industry, as well as the trash incineration industry, all use overhead cranes and trolleys similar to the one at issue in the above referenced case.

5. The above listed industries use overhead cranes and trolley like the one at issue, as a machine to pick up heavy objects and move the objects to another location.

6. Most of the overhead cranes and trolleys used by the industries listed above are located inside buildings, structures or partially enclosed sheds.

7. In my opinion, the overhead cranes and trolleys used in the industries listed above are very similar in their design and function as the overhead crane and trolley at issue, in the above referenced case.

8. In my opinion, the overhead cranes and trolleys used in the above listed industries are not improvements to real estate or real property as there is generally very little customization or uniqueness of design involved in the design and manufacture of these overhead cranes and trolleys.

9. The only customizing that is sometimes done is that the overhead cranes and trolleys are made to fit inside a building, shed or structure.

Appendix H

10. The functions and purposes of the overhead cranes and trolleys in the above listed industries are not affected, changed, diminished or otherwise altered by the fact that they are manufactured to fit inside a building, shed or structure.

11. In my opinion, the overhead crane and trolley at issue in the above referenced case are standard models of overhead cranes and trolleys and do not possess any special features, unique to RESCO's business.

12. In my opinion, the overhead crane and trolley at issue, could be removed from the RESCO facility and with very little modification, used in one of the above listed industries.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 4th DAY OF DECEMBER, 1992.

s/ E. Patrick McGuire
E. Patrick McGuire

STATE OF ARKANSAS

COUNTY OF PULASKI

SUBSCRIBED AND SWORN to before me, a Notary Public, this 4th day of December, 1992.

s/ Valerie A. Gass
Notary Public

My Commission Expires:
2/4/02

APPENDIX I — TRANSCRIPT OF ORAL ARGUMENT ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PAGES 25-35

* * *

[25] THE COURT: But, see, the problem there is that Snyder specifically argued that the summary judgment record demonstrated they designed the bleacher units specifically for the rink.

MR. ROGERS: Yes.

THE COURT: Now, here, what do I have to tell me that Harnischfeger did that here, designed in the sense that it's used in *McDonough v. Marr*?

MR. ROGERS: Yes. Your Honor, Harnischfeger, as set forth in the affidavit of Mr. Toth, designed this crane to fit within this particular building. Among the components or aspects of the crane — and I would agree with Mr. Costello. All cranes, in a general sense, have certain functions or components. They all have things that they must be supported on and they all have things that lift and move whatever it is that the customer intends to move.

So, in that sense, clearly all cranes have certain things that they have to have in order to accomplish the function. But, even down to the dimension of the wire rope that is used to attach to the grappling shovel to the intricate details of the electrical distribution system, to the individual controls, to the overall width, height, shape, and the overall dimensions of all of the girders necessary for that overhead crane to [26] fit within the existing plant. And the affidavit of Mr. Toth clearly establishes that Harnischfeger designed each and every one of those components. There's a list of, I think, over 27 or 30 different individual aspects

of the design work which were performed. And, in fact, Your Honor, as you pointed out, the claim against Harnischfeger is that they were negligent in the design of, the equipment. There is no dispute, I would suggest, no genuine dispute, as to that material fact, whether or not Harnischfeger is an engineering company involved in the design of overhead cranes. And that is a different question from whether or not the crane is actually an improvement. So, the factual record before you clearly demonstrates that that is not —

THE COURT: Well, but, you see, as I read Toth, what was involved here was a kind of off-the-rack identification of actor being given specifications of grapple buckets and gear reducers and various kinds of control components, not new design of those materials, but essentially mix and match.

MR. ROGERS: If Your Honor has that impression from the affidavit, I would certainly disagree and suggest to the contrary, that the way this process works, Your Honor, also is spelled out in the affidavit.

THE COURT: Well, I'll look at it. Did they [27] fabricate new gear reducers for this?

MR. ROGERS: No.

THE COURT: Solely for purposes of RESCO?

MR. ROGERS: No, not gear reducers. They didn't fabricate — they have gear reducers.

THE COURT: Okay. So, let's go down the list of the things that are alleged to have been custom designed.

The grapple buckets were off the rack?

MR. ROGERS: No. They are actually purchased from another company of which there are many different size grapple buckets.

THE COURT: Right. But they're off the rack? This isn't —

MR. ROGERS: Well, they were purchased from another entity which had to manufacture them. But, Harnischfeger, the role that they played in the design of them —

THE COURT: Is this the only grapple bucket that this supplier has ever provided —

MR. ROGERS: Absolutely not.

THE COURT: — of this type?

MR. ROGERS: No.

THE COURT: Okay. So, the wire rope, similarly?

MR. ROGERS: The wire rope has to be fabricated of a certain overall length, dimension, number of strands, [28] thickness, et cetera, to support the particular lifting requirements of this particular customer. So, in that sense, Your Honor, yes, that would have to be fabricated and manufactured and created of a particular type for this particular customer and the requirements that they have.

THE COURT: Well, the sizes of the control components?

MR. ROGERS: Every single control component that — if Your Honor means the electrical control components from — for example, the operator's cab, that's essentially the control components. Those cabs are manufactured for each particular crane. They're not in stock off the rack. They're manufactured by Harnischfeger into which the electrical wiring and controls is designed and incorporated for that particular operator's cab.

THE COURT: Well, how do I distinguish this from — to use Mr. Costello's arresting example — the Zamboni machine?

MR. ROGERS: Well, the Zamboni machine, if I could refer back to the definition of what an improvement is under Massachusetts law. The definition of an improvement is — this is from the *Milligan* case. There are a number of cases, Your Honor — "a permanent addition to or betterment or real property." So, that under the first definition, a permanent addition to or [29] betterment of real property, the Zamboni machine doesn't qualify under this —

THE COURT: All right. So, let's take an electrical switchboard.

MR. ROGERS: That can constitute an improvement to real property, certainly under that definition. It's an addition to or a betterment of real property.

THE COURT: Well, are you telling me, then, that that's what *Dighton* tells me I should find with respect to the electrical switchboard?

MR. ROGERS: No. The distinction of the *Dighton* case is that that was, in fact, a circuit breaker that was taken off the rack by

the manufacturer. If you look at the *Dighton* decision carefully, it posts two certified questions. And the defendants in that case conceded that it did not provide any individual particularized service with respect to the design of that circuit breaker panel. They conceded, Your Honor, that it was a mass produced standardized off-the-rack circuit breaker panel that just made its way into the building. So, it was on that basis that the court concluded that the circuit breaker itself was not an improvement. And, second, that the actor involved — the manufacturer — had not rendered particularized design services for that particular building into which the component was eventually [30] incorporated. So, that is the distinction of *Dighton*.

THE COURT: Well, so, I look at Toth. And from Toth, I'm supposed to find that the services of responding to the specifications constitute design. Is that —

MR. ROGERS: Yes. Your Honor, the claim — the allegations made in the case are that Harnischfeger was negligent in the design of the crane. It's absolutely an undisputed fact that they were involved. There are engineers at Harnischfeger that design —

THE COURT: Well, there may be. But, let's assume something else. Let's assume simply a bucket mechanism that is affixed to the real property and that's the only thing that's provided.

MR. ROGERS: If there weren't any individualized, particularized service to design the particular bucket involved, then I would agree with Your Honor. And that's simply not the case with what we have here. That's the *Dighton* case. It was a standard off-the-rack component, which RESCO called the bucket manufacturer and said "We need a bucket this big" and they

shipped it to them. They weren't individualized, particularized services for that bucket under those circumstances.

THE COURT: Well, let me go back to the Toth affidavit because I want to be sure I understand where I find that this was particularized service

[31] And is it on page three — is that what I have to do is look at the middle of page three and say they were custom-designed, manufactured, and built in accordance with these specifications and involved the following components?

MR. ROGERS: Yes. And in addition to that —

THE COURT: And is it because it's complex, complex in the dictionary definition of complex, involving more than one or two parts?

MR. ROGERS: No. I won't agree that the crane and its essential components — overhead cranes are the same. They all have certain essential components. But, every single element of this crane was custom designed to be a certain size, shape, toughness of materials and so forth to accommodate the particular needs of this customer. And as you can see from the videotape, the breadth, width, dimension and so forth of the bridge girders and all of the other supporting structures to within tolerances of clearances of six or two inches, as I have described to you, all of those have to be custom designed. In fact, the processes — also, the Toth affidavit describes them. Harnischfeger receives from a customer specifications based upon a certain drawing which is provided for all of those dimensions and lifting capacities and so forth. And it is only after that point [32] that actual engineering drawings are created for all of those hundreds and thousands of

components that make up the crane. And all of those drawings and so forth —engineering drawings — were supplied with Mr. Toth's affidavit. So, that is the essential action that is taken by Harnischfeger to design a crane for this particular building. They don't just say, "Okay, we need a bridge girder" or "take it off the shelf." They only create the engineering drawings after they know what this particular crane has to look like and what kind of capacity it has to be which I would contrast to Your Honor an automobile manufacturer, for example. They have one design drawing for every Oldsmobile 98 ever made and they just keep manufacturing. So, that's different. They don't create new engineering or design drawings for each crane that's built. And that's what is done by Harnischfeger in the design of the crane.

So, I would say pages three, four and five —well, not five — three and four do establish in an undisputed way that there is design work undertaken by Harnischfeger.

Did Your Honor have any further questions on that point?

THE COURT: No. Let me — go ahead.

MR. ROGERS: I just want to comment on one [33] thing. Within the class of individuals to whom the protection is afforded, again, from the *Klein* case, the statute has the effect of granting immunity from suit only to architects, engineers, contractors and others involved in the design and planning of the improvement.

So, I would submit that Harnischfeger in this case, the undisputed facts demonstrate, is an engineer or other. It's another person that was involved in the design and planning of this crane. And then the next issue becomes was it an improvement. And I just wanted to go back to that definition of what an improvement is. We

covered that it has to be a permanent addition to or betterment of the real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs. And each of those elements are clearly satisfied on the undisputed facts before Your Honor.

I guess, Your Honor —

THE COURT: Well, let's just put it this way.

Mr. Costello has said there are two elements of it. One is you define the class. You say that you're part of the class, but there is a possibility in defining the class in that fashion that you draw into it virtually everybody who does the design of some piece of equipment [34] that is incorporated into an improvement. There is in virtually every construction of a building a spectrum of involvement by subcontractors and separate contractors, some quite sophisticated, some not so sophisticated. And is not the issue sufficiently disputed to require resolution by the jury?

MR. ROGERS: I don't think so, Your Honor, in this sense: Whether or not something is an improvement and whether or not a person is entitled to or fits within a class of people under the applicable definition, that determination is an issue of law for the Court. Whether the factual elements or the elements of the definition itself are satisfied, I would agree, is a question of fact.

THE COURT: Well, if you use standardization as the litmus test for this, then there are, you know, a spectrum of standardized products, a degree of standardization, and a degree of complexity in the standardization. The guy who says "give me a two by two space and I'll give you a circuit board," that's hardly an

improvement, it seems to me. Someone who does a much more sophisticated and detailed and complex, that may be an improvement. But, where we lie on that spectrum seems to me to be at least open to some kind of factual dispute.

MR. ROGERS: Not in this case, I don't believe. [35] I would suggest that could be a factual dispute in some cases, but certainly not in this case. You have the elements of complexity and non-standardization established before you in an undisputed way, those elements, those facts. There is no suggestion that when the RESCO Company and through its engineering firm, Russ Engineering, contacted Harnischfeger, they said, "We need a crane to lift 13-1/2 tons overall capacity, send us one." That is not what the facts demonstrate. What took place, in fact, the design of this crane was carried out over a 14-1/2 month period, the design and manufacturing and eventual shipment of the crane. And as the drawings and so froth demonstrate, Your Honor, there is a high degree of nonstandardization of particularized engineering services that were provided.

THE COURT: All right. Mr. Costello, I'll give you the last word.

MR. COSTELLO: Thank you, Your Honor.

First of all, I respectfully disagree with Mr. Rogers as there is any disputes in the ways that Toth presents his argument. We clearly dispute whether there is a permanent fixture. Our two experts said this fixture that he calls a fixture and we call a machine can be removed and can be used in other, obviously, buildings, for other reasons. Secondly, —

* * *

APPENDIX J — MEMORANDUM AND ORDER IN *ANDELLA VS. WESTINGHOUSE ELEVATOR CO. ET AL.,*

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
CIVIL NO.: 89-5431

MIDDLESEX, ss.

JOAN ANDELLA

vs.

WESTINGHOUSE ELEVATOR COMPANY & another[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT WESTINGHOUSE ELEVATOR COMPANY'S MOTION FOR SUMMARY JUDGMENT

Plaintiff brings this negligence action as a result of injuries she sustained while riding an escalator in Filene's department store (Filene's) in the North Shore Shopping Center in Peabody, Massachusetts. She claims that Defendant Westinghouse Elevator Company (Westinghouse) was negligent in designing, constructing, and installing the escalator, while Defendant Montgomery Elevator Company (Montgomery) was negligent in maintaining and repairing the escalator. In addition, Plaintiff charges each defendant with breaching implied warranties of fitness for a particular purpose and of merchantability in relation to their respective contracts with Filene's. Defendant Westinghouse moves for summary judgment on all counts against it.

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1. Montgomery Elevator Company.

Appendix J

In a motion for summary judgment, the moving party has the burden of showing that there are no genuine issues of material fact in dispute and that he is entitled to judgment as a matter of law. *Cassesso v. Commissioner of Correction,* 390 Mass. 419 (1983); *Attorney General v. Bailey,* 386 Mass. 367 (1982). The undisputed facts in this case are as follows.

In 1956, Westinghouse entered into a subcontract with Aberthaw Construction Company to design, construct and install an escalator for Filene's. Under the contract, Westinghouse guaranteed its workmanship and materials for one year from the date of acceptance. The work was completed and approved by Filene's in 1957. Westinghouse provided no further services with respect to the escalator after that time. The plaintiff was injured while riding the escalator in Filene's in 1987.

The Negligence Claim

Ordinarily, a negligence action to recover damages for personal injuries must be brought within three years of the date of injury. G.L. c. 260 §2A. Although the plaintiff has filed this action within the applicable statute of limitations, the defendant contends that the claim is time barred due to G.L. c.260 §2B, a statute of repose. Section 2B provides:

> Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the

> earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner. (emphasis added)

If Westinghouse is a protected actor under G.L. c.260 §2B, then Plaintiff's ability to assert a negligence claim against Westinghouse terminated in 1963, before her cause of action even accrued.

In *Dighton v. Federal Pacific Electric Co.; Sert, Jackson & Associates, Inc.*, 399 Mass. 687, 694 (1987), the Court utilized a two part analysis in determining whether or not a particular actor was protected by G.L. c. 260 §2B. Under this test, the Court must ascertain the nature of the services performed by the actor. If the activity engaged in by the actor is protected by the statute, then the Court must determine whether the activity respects an improvement to real property.

Here, it's rather clear that Westinghouse was engaged in the protected activities of designing and constructing an escalator for use in Filene's. The plaintiff attempts to paint the defendant as a manufacturer of a good, a mere supplier of a product. In support, the plaintiff cites the *Dighton* case, where the Court found that the manufacturer of a circuit braker panel was not engaged in protected activity.

There, however, the manufacturer had conceded that it did not render any construction services and that its status was that solely of a supplier and a manufacturer of a construction component. *Dighton v. Federal Pacific Electric Co.; Sert, Jackson & Associates, Inc.*, 399 Mass. at 690. Westinghouse, on the other

hand, did fare more than simply supply an escalator to Filene's. It was the subcontractor that was responsible for the design and construction of the escalator. As a result, the Court is satisfied that Westinghouse was engaged in activity protected by G.L. c.260 §2B.

The second inquiry is whether the installation of an escalator is considered an improvement to real property under the statute. In *Parent v. Stone & Webster Engineering Corp.*, 408 Mass. 108, 111 (1990), the Court accepted a dictionary definition of the word "improvement"; a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

Using this standard, the Court found that the installation of an electrical distribution panel, used to provide power to machinery in an electrical generating plant, constituted an improvement to real property. In addition, the Court noted that installation of the distribution panel compared favorably with other construction projects deemed to be improvements under §2B. *See Parent v. Stone & Webster Engineering Corp.*, 408 Mass. at 111 n.5 (for a listing of other accepted "improvements" under § 2B). Likewise, this Court finds that the installation of the escalator was a permanent addition to Filene's which involved the expenditure of labor and money and which served to make the property more valuable. Consequently, Plaintiff is precluded by G.L. c.260 §2B from maintaining a negligence claim against Westinghouse.

The Breach of Warranty Claims

Plaintiff next asserts breach of implied warranty claims against Westinghouse. However, the Court in *Klein v. Catalano,*

386 Mass. 701, 718-720 (1982) made clear that breach of implied warranty claims cannot be maintained against a defendant who is protected by G.L. c.260 §2B. The Court reasoned that the elements of a breach of implied warranty claim would be the same as those for a negligence claim in cases where G.L. c.260 §2B applied. *Cf. Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc.*, 396 Mass. 818, 822-823 (1986)(where the Court found that breach of an express warranty claim could stand where other claims were barred by G.L. c.260 §2B).

As a result, a plaintiff could circumvent the barrier of G.L. c.260 §2B simply by bringing a claim under a different name. *See Dighton v. Federal Pacific Electric Co.; Sert, Jackson & Associates, Inc.*, 399 Mass. at 691 n.6 (where the Court noted that a claim for breach of implied warranty pursuant to the Uniform Commercial Code "states a cause of action which sounds, like negligence, in tort and not in contract.") Because Plaintiff's breach of implied warranty claims are essentially "actions of tort", prohibited by G.L. c.260 §2B, the remainder of the counts against Westinghouse must be dismissed.

ORDER

Wherefore, Defendant Westinghouse Elevator Company's Motion for Summary Judgment is *ALLOWED.*

s/ Paul A. Chernoff
Paul A. Chernoff
JUSTICE OF THE SUPERIOR COURT

Entered: 11/27/90
Date

APPENDIX K — MEMORANDUM AND ORDER IN *CHESTERTON V. JORDAN MARSH CO.*

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
CIVIL ACTION
NO. 141724

GERTRUDE CHESTERTON, EXECUTRIX OF THE ESTATE OF BERT CHESTERTON

VS.

JORDAN MARSH COMPANY, [AND A THIRD-PARTY ACTION[1]]

MEMORANDUM OF DECISION ON
MOTION FOR SUMMARY JUDGMENT
ON COUNT II OF THIRD-PARTY COMPLAINT
BY THIRD-PARTY DEFENDANT WESTINGHOUSE
ELECTRIC CORPORATION

I. PROCEDURAL HISTORY

This civil action was commenced by the filing of a Complaint on December 16, 1983. The plaintiff alleges that her deceased husband sustained personal injuries when the escalator on which he was riding in the Jordan Marsh Company (Jordan Marsh) store in Braintree on September 18, 1982, stopped suddenly.

Jordan Marsh answered on July 18, 1984, and on the same day

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1. Jordan Marsh Company is plaintif in the third-party action. F.S. Payne Company and Westinghouse Electric Corporation are third-party defendants.

filed a Third-Party Complaint, seeking indemnity in Count II against the third-party defendant Westinghouse Electric Corporation (Westinghouse). Jordan Marsh claims that and that it operates to "abolish or abrogate" remedies in both tort and warranty claims. *Klein v. Catalano,* 386 Mass. 701, 702, 719, nn. 3 & 19 (1982). Since the injury alleged in this case occurred more than six years after Westinghouse designed the elevator (in 1966) and installed it (in 1967), the statute would effectively protect Westinghouse if it is applicable under these facts.

A. Is Westinghouse, as designer, manufacturer, and installer of an escalator, within the class of contractors protected by G.L. c. 260, § 2B?

The *Klein* court looked to the purpose of the statute to determine who was afforded its protection, and concluded that those involved in the design and construction of real property need protection because once the completed project is accepted by the owner, the contractor loses both control over the property and the right to inspect or maintain it. Architects and engineers, who for the *Klein* court epitomize the kind of design professional that § 2B protects, have but a "single chance" to produce a "defect-free structure." Their work is "not susceptible to the quality control standards of the factory," and they are held to a standard of reasonable care based on their professional expertise, rather than any warranties of fitness for a particular purpose. *Klein* at 716-719.

Westinghouse argues that it meets these criteria. Responsibility for maintaining the escalator belonged to Westinghouse, the manufacturer of the escalator, breached both express and implied warranties. On February 21, 1984, Westinghouse answered, and thereafter, on July 27, 1984, moved for summary judgment in its favor on Count II, on the basis of G.L.

c. 260, § 2B. Westinghouse asserts that the action was commenced 17 years after the installation of the escalator in 1967.

Oral argument was held, and the parties favored the court with helpful memoranda.

II. THE ISSUES

Two basic issues are presented:

1. Is Westinghouse, as manufacturer, designer and installer of an escalator, within the class of contractors protected by G.L. c. 260, § 2B?

2. Is an escalator an improvement to real property?

III. DISCUSSION

Westinghouse asserts that under the provisions of G.L. c. 260, § 2B, the third-party claim against it in this case is barred. Section 2B states:

> Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the performance or furnishing of such design, planning, construction or general administration.

Appendix K

In construing the statute, the Supreme Judicial Court has noted that it is more a statute of repose than of limitations, another company at the time of the accident; each escalator is custom designed to fit a particular location; and state licensing requirements hold the company to a minimum level of expertise. Jordan Marsh argues, however, that under *Klein* Westinghouse is not protected. Although stock parts are adapted to the various locations, they are still "standard goods" produced "in the controlled environment of the factory." *Klein* at 716.

It is clear that if Westinghouse can be characterized as a mere materialman it is not afforded the protection of § 2B. *King's Department Stores, Inc. v. Poley-Abrams Corp.*, 386 Mass. 1008, 1009 (1982). However, the distinction is not always clear cut, and a materialman could fall into the statute's protection if he acts primarily like a contractor. *Conner v. Canal Electric Co.*, No. 78-2398-S (D. Mass., January 25, 1984).[2] Arguably, individual expertise like that contemplated by the *Klein* court may be required in the adaption of the standard design and equipment to a particular area. Nevertheless, without further factual information it appears that there is a qualitative difference in the kind of expertise required of a design professional like an architect, and one who, like Westinghouse, adapts stock parts in differing combinations to suit someone else's structure.[3]

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2. An unreported decision found in the Lexis System.

3. See proposal specifications submitted by Westinghouse in the case of *Straczynski v. Jordan Marsh* #128416, currently pending in Norfolk Superior Court, a copy of which is attached to Jordan Marsh's brief and authenticated by an affidavit of its counsel.

Appendix K

B. Is an escalator an "improvement to real property?"

Research has discovered only one Massachusetts court that has directly considered this question. In *Brown v. Air Canada,* Middlesex Superior Court Civil Action No. 79-3615, (March 23, 1983), a judge sitting in the Superior Court[4] ruled that an escalator was not an improvement to real property for the purposes of G.L. c. 260, § 2B. The court there applied *Klein's* policy approach, and concluded that considering an escalator as an "improvement" to real property would not further the Legislature's intent.

Three other Massachusetts cases have construed the phrase "improvement to real property." In 1982, the Appeals Court held that a surveyor's plan "not integrated with a building plan, or a design for construction," was not an improvement. *Raffel v. Perley,* 14 Mass. App. Ct. 242, 245 (1982). The court also noted that its holding comported with the definition found in Webster's Third New International Dictionary (1971).[5] The United States District Court for the District of Massachusetts has held that a unit housing an air preheater was an improvement to real property because its design and construction involved the "individual expertise" of skilled architectural and engineering services. *Conner, supra.* Last, in *Milligan v. Tibbetts,* 391 Mass. 364 (1984), the Supreme Judicial Court reiterated the policy reasons behind a statute of

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4. The judge so ruling was a justice of the Probate and Family Court Department, sitting in Superior Court by statutory authority.

5. Improvement: "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." Webster's Third New International Dictionary (1971) at 1138.

repose[6] and concluded that the construction of a dead-end road was an improvement to real property.

As the Superior Court's opinion in *Brown* points out, case law of other jurisdictions is particularly helpful in articulating a single workable principle which will aid in the court's determination.[7] Nevertheless, it appears that the kind of structure or equipment most likely to be considered an "improvement" is not just one which superficially meets the dictionary definition, but, rather, one which is permanently attached and is an essential and fully integrated part of the overall structure. In *Conner,* the unit in question was nine stories tall and was built as *part* of the power plant itself. Once installed, something that big has "innate characteristics of permanence." *McClanahan v. American Gilsonite Co.,* 494 F. Supp. 1334, 1341 (D. Colo. 1980). Such an improvement is "required for the structure to actually function as intended." *Brown v. Jersey Central Power & Light Co.,* 394 A.2d 397, 405 (N.J. Super. Ct. App. Div. 1978).

An escalator in a department store is certainly an improvement in the ordinary sense in that it enhances the value and usefulness of the property. It does not, however, become such an integral part of that property that the overall structure cannot function properly without it. Considering the *Klein* court's emphasis on the purposes of G.L. c. 260 § 2B, and the fact that Westinghouse specifications themselves state that the equipment designed and installed by them "can be removed without material

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6. "[L]ong lapses in time between the date of completion, the date of injury and finally, litigation . . . lead to problems of proof, i.e. incomplete or lost records, unavailable witnesses, and defective memories." *Milligan* at 368.

7. See *Brown, supra,* at 4, n. 3 for a summary of these decisions.

injury to the property" (see Appendix A-7), it follows that an escalator is not an "improvement to real property" under § 2B.

CONCLUSION

Westinghouse's Motion for Summary Judgment as to Count II is denied.

By the Court,

s/ James P. Lynch, Jr.
James P. Lynch, Jr.
Justice of the Superior Court

Dated: October 16, 1984

APPENDIX L —MEMORANDUM AND ORDER IN *MITCHELL V. UIPE PRODUCTS, INC., ET AL.*

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. 91-6675-E

FREDDIE MITCHELL

vs.

UIPE PRODUCTS, INC., d/b/a
UIP ENGINEERED PRODUCTS, INC.,
and A.M. KINNEY, INC.

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

The plaintiff Freddie Mitchell ("Mitchell") brought this negligence action against the defendants UIPE Products, Inc. ("UIPE") and A.M. Kinney, Inc. ("Kinney")[1], alleging that he was injured when he was struck by hot asphalt that blew out from piping designed by Kinney that was attached to a machine known as a "Seal Down Applicator Unit" ("seal-down applicator") designed, manufactured and installed by UIPE in a manufacturing facility where Mitchell worked.

Kinney and UIPE have now moved separately for summary judgment against Mitchell, pursuant to Mass. R. Civ. P. 56, on the

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1. Freddie Mitchell originally filed his complaint against UIPE Products, Inc., who, in turn, impleaded A.M. Kinney, Inc. as a third-party defendant pursuant to Mass. R. Civ. P. 14(a). Thereafter, Freddie Mitchell amended his complaint to assert claims directly against A.M. Kinney, Inc.

ground that Mitchell's claims are barred by the six-year statute of repose established by G.L. c. 260, § 2B. Kinney further contends that UIPE is not entitled either to indemnity or contribution from Kinney. Having concluded that the plaintiff's action is barred by G.L. c. 260, § 2B, both defendants' motions for summary judgment must be allowed.

BACKGROUND

In 1983, Mitchell's employer, Bird, Inc., had installed in its manufacturing facility a production line (hereinafter "roofing line") for the manufacture of asphalt roofing shingles. Incorporated in this roofing line was a machine known as a Seal Down Applicator Unit ("seal-down applicator"), which was designed, manufactured and sold to Bird by the defendant UIPE and attached to process piping, designed by the defendant Kinney. UIPE was not involved in the design or construction of the roofing line. The roofing line, including the seal-down applicator and the process piping, became operational by February 1985. On May 21, 1990, Mitchell was seriously burned by hot asphalt while he was cleaning solidified asphalt from the process piping attached to the seal-down applicator. Mitchell filed this action against UIPE on October 4, 1991, asserting that UIPE negligently designed, manufactured and tested the Seal Down Applicator Unit, as well as failed to adequately warn against its dangers; that UIPE breached express and implied warranties; and that UIPE's conduct constituted unfair and deceptive acts or practices in violation of G.L. c. 93A, §§ 2 and 9. Mitchell amended his complaint on December 23, 1993, to assert similar claims against Kinney.

Both UIPE and Kinney have now moved separately for summary judgment against Mitchell on the basis of the Massachusetts statute of repose, G.L. c. 260, § 2B, which provides as follows:

Appendix L

> Action[s] of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property . . . shall be commenced only within three years after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession or occupancy by the owner.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. *Cassesso v. Commissioner of Correction,* 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes,* 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, "and that the moving party is entitled to judgment as a matter of law." *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). A party moving for summary judgment who does not have the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative evidence that negates an essential element of the opponent's case or by "demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); accord, *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a

genuine issue of material fact in order to defeat [the] motion. *Peterson,* 404 Mass. at 17. "[T]he opposing party cannot rest on his or her pleadings and more assertions of disputed facts to defeat the motion for summary judgment." *Lowland v. Eissner,* 405 Mass. 207, 209 (1989).

In the present case, both UIPE and Kinney contend that Mitchell's suit is barred by the statute of repose, G.L. c. 260, § 2B, because Mitchell commenced this action more than six years after the seal-down applicator and process piping were installed and the roofing line became operational. The court agrees. "Whether a defendant's activities fall within the statute is a question of law." *Snow v. Harnischfeger Corp.,* No. 93-1489, Slip op. at p. 8, (1st. Cir., December 29, 1993). General Laws c. 260, § 2B, "precludes recovery against those within the protection of the statute for any injury which occurs more than six years after the performance or furnishing of the design, planning, construction, or general administration of an improvement to real property. Simply put, after six years, the statute completely eliminates a cause of action against certain persons in the construction industry." *Klein v. Catalano,* 386 Mass. 701, 702 (1982).

"[W]hen faced with the question of whether the defendant is entitled to repose under M.G.L. c. 260 § 2B, the first question to be answered is 'Is the defendant a protected actor under M.G.L. c. 260 § 2B?' " *Snow supra,* at 17. "The purpose of the statute is to protect providers of 'individual expertise' who render particularized services for the design and construction of particular improvements to particular pieces of real property." *Id.* at 12. "The statute does not name a class of protected actors, but instead extends protection to 'those who commit any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property.' " *Id.* For

instance, "an actor such as a manufacturer or supplier may be protected if that actor becomes more than a 'mere' supplier by engaging in protected activities." *Id.* at 13, citing *McDonough v. Marr Scaffolding Co.*, 412 Mass. 636, 641-42 (1992) (manufacturer who designed bleacher units specifically for the rink in which they were installed by another is more than mere supplier and is entitled to benefit of statute). Hence, "application of the statute is necessarily dependent on the nature of the party's activities."[2] *Snow supra,* at 13. As stated by the First Circuit in *Snow:*

> In considering whether an actor not clearly within the statute is entitled to repose, the court engages in a fact-based activities analysis. (citation omitted). The court must consider the motivation of the actor in producing the

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2. Contrary to Mitchell's contention, the applicability of G.L. c. 260 § 2B is not dependent on the product's status as a permanent fixture or a movable good. As stated by the First Circuit (following Massachusetts law):

> The SJC has rejected adoption of a fixture analysis to determine applicability of the statute of repose, noting the statute "makes no reference to 'fixtures,' nor does it appear that the Legislature intended by its choice of the common term 'improvement,' to subsume that tangle of highly technical meanings, often distinct in diverse legal contexts, which is the law of fixtures." (citation omitted). The fact that a product is affixed, permanently or otherwise, neither makes the product an improvement nor turns the producer into a protected actor.

Snow v. Harnischfeger Corp.; No. 93-1489, Slip op. at p. 11-12 (1st Cir. December 29, 1993).

> improvement. (citation omitted). If the actor designed the improvement for public sale or for general use, then the actor is not protected because the actor is engaged in activity of creating a fungible product. (citation omitted). If, however, the improvement is produced for a particular project and to the specifications of an architect or an engineer, M.G.L. c. 260, § 2B may protect the actor as someone engaged in the activity of designing a particularized improvement.

Snow v. Harnischfeger Corp., No. 93-1489, Slip op. at 15-16, citing *Dighton v. Federal Pacific Electric Co.*, 399 Mass. 687 (1987).

Here, UIPE claims the protection of G.L. c. 260, § 2B by virtue of its design and manufacture of the seal-down applicator to specifications specifically requested by Mitchell's employer, Bird, Inc. ("Bird"), and by shipping the seal-down applicator to Bird in February 1984. Mitchell does not dispute that UIPE designed the seal-down applicator. In fact, Mitchell's amended complaint alleges that his injuries were due, in part, to UIPE's negligence or recklessness in designing the seal-down applicator. Mitchell asserts, however, that summary judgment is inappropriate because there is no evidence as to whether UIPE regularly manufactures seal-down applicators.

Whether UIPE regularly manufactures seal-down applicators is without significance here, for UIPE's status as a designer of the seal-down applicator qualifies UIPE as a protected actor under G.L. c. 260, § 2B, and would thus bar Mitchell's claims if the seal-down applicator constitutes "an improvement to real property

within the meaning of § 2B." *McDonough,* 412 Mass. at 641-42; *Cournoyer v. Massachusetts Bay Transp. Auth.,* 744 F.2d 208, 210 (1st Cir. 1984) (holding that under *Klein v. Catalano,* 386 Mass. 701 (1982) the applicability of § 2B turns not on whether the improvement was pre-fabricated or mass produced, but whether the manufacturer relinquished control after designing, manufacturing and supplying the item). Similarly, Kinney's status as a designer of the process piping qualifies Kinney as a protected actor under G.L. c. 260, § 2B, and would likewise bar Mitchell's claims if such piping constitute an "improvement to real property." *McDonough,* 412 Mass. at 641-42. Hence, the only remaining question is whether the seal-down applicator and process piping constitute "improvements to real property" under G.L. c. 260, § 2B.

Massachusetts courts have interpreted the phrase "improvement to real property" to mean "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Conley v. Scott Products, Inc.,* 410 Mass. 645, 647 (1988) (quoting Webster's Third New International Dictionary 1138 (1971)); *see also Dighton,* 399 Mass. at 697; *Cournoyer,* 744 F.2d at 210. Applying this definition, Massachusetts courts have held that foam insulation, bleachers, and hydraulic lifts constitute "improvements to real property" under § 2B. *See Conley,* 401 Mass. at 647 (foam insulation); *McDonough,* 412 Mass. at 640 (bleachers); *Ford v. Pizza Romano, Inc.* No. 92-5842-C, Cratsley, J. (Suffolk Super. Ct. December 29, 1993) (hydraulic lift). And most notably, the First Circuit construing Massachusetts law, has recently found the installation of overhead cranes in an engineering plant to constitute an "improvement" under G.L. c. 260, § 2B. *Snow supra.*

Appendix L

Applying the above definition to the present case, the court concludes that both the seal-down applicator and process piping constitute "improvements to real property" under G.L. c. 260, § 2B, because they are at least "betterments" that enhance both the usefulness and the value of the Bird manufacturing facility. Since Mitchell instituted this suit more than six years after the seal-down applicator and process piping were installed, and after the Bird manufacturing facility became operational, Mitchell's tort claims are barred by G.L. c. 260, § 2B. Further, because Mitchell's warranty claims are identical to his tort claims, those claims are also barred by G.L. c. 260, § 2B, for "[t]o hold otherwise would frustrate the purpose behind G.L. c. 260, § 2B." *Klein,* 386 Mass. at 719-20; *see also McDonough,* 412 Mass. at 642-43 ("To allow the plaintiffs to recase their negligence claim in order to circumvent the operation of the repose statute would nullify the purpose of the repose statute altogether."). Finally, since G.L. 260, § 2B bars Mitchell's claims against both UIPE and Kinney, Kinney's motion for summary judgment as to the issue of indemnity or contribution has been rendered moot.

ORDER

For the foregoing reasons, the motions of UIPE Products, Inc. and A.M. Kinney, Inc. for summary judgment on the claims of Freddie Mitchell are *ALLOWED.*

Peter M. Lauriat
Justice of the Superior Court

DATED: March __, 1994